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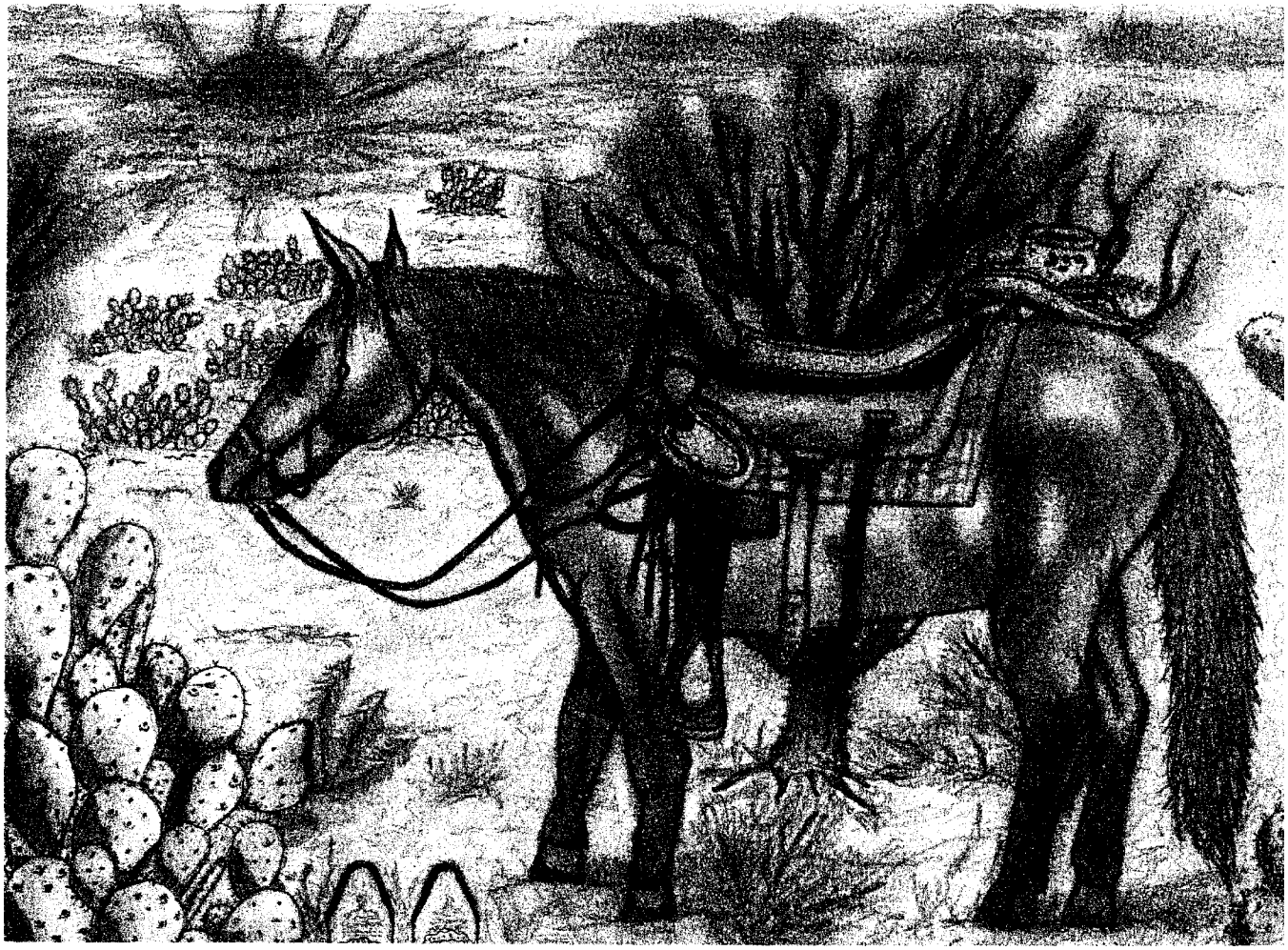

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.17, §15.18

The General Land Office is renewing the effectiveness of the emergency adoption of new §15.17 and §15.18, for a 60-day period. The text of the new sections were originally published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8101).

Filed with the Office of the Secretary of State on December 22, 2008.

TRD-200806656
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Original Effective Date: September 12, 2008
Expiration Date: March 10, 2009
For further information, please call: (512) 475-1859

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

The Office of Rural Community Affairs (Office) proposes the amendments to §§255.1, 255.2, 255.4, 255.5, 255.8, 255.9, 255.11 and 255.17, and the repeal of §§255.3, 255.10, and 255.12 - 255.16 for the Community Development Block Grant (CDBG) non-entitlement area funds.

The amendments are proposed to specify criteria contained within the 2009 Action Plan. The repeal is proposed to delete rules that are no longer necessary.

Charles S. (Charlie) Stone, Executive Director of the Office, has determined that for the first five-year period the proposal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal and amended sections as proposed.

Mr. Stone has also determined that for each year of the first five-year period the proposal is in effect the public benefit as a result of enforcing the repeal and amended sections will be the equitable allocation of CDBG non-entitlement are funds to eligible units of general local government in Texas. There will be no cost to small business or individuals.

Comments on the proposal may be submitted to Mark Wyatt, Director of Community Development, Office of Rural Community Affairs, P.O. Box 12877, Austin, Texas 78711, telephone: (512) 936-6701. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register.*

10 TAC §§255.1, 255.2, 255.4, 255.5, 255.8, 255.9, 255.11, 255.17

The amendments are proposed under §487.052 of the Texas Government Code, which provides the Board with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposed amendments.

§255.1. General Provisions.

(a) Definitions and abbreviations. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Application--A written request for Texas Community Development Block Grant Program (TxCDBG) funds in the format required by the Office or by the TDA for Texas Capital Fund (TCF) applications.

(3) - (18) (No change.)

(b) Overview--Community Development Block Grant nonentitlement area funds are distributed by the TxCDBG to eligible units of general local government in the following program areas:

(1) - (6) (No change.)

[~~(7) Young v. Martinez fund (discontinued after 2003 program year);~~]

[~~(8) housing fund (discontinued after 2004 program year);~~]

(7) [~~(9)~~] small towns environment program fund;

[~~(10) microenterprise fund (program income);~~]

[~~(11) small business fund (program income);~~]

[~~(12) section 108 loan guarantee pilot program;~~]

[~~(13) community development supplemental fund;~~]

[~~(14) non-border colonia fund;~~]

(8) [~~(15)~~] renewable energy demonstration pilot program.

(c) Types of applications.

(1) Single jurisdiction applications. An applicant may submit one application per TxCDBG fund, as outlined in subsection (b) of this section, on its own behalf, or as a participant in a multi-jurisdictional application, per funding cycle (except as specified for the TCF, community development fund, housing fund, colonia fund, and small towns environment program fund).

(A) - (B) (No change.)

[~~(C) A county may submit a single jurisdiction application for a housing rehabilitation program that includes the rehabilitation of housing units in unincorporated areas and incorporated cities located in the county. The housing units that are rehabilitated under the county program must be located in unincorporated areas and in each incorporated city that is included as a participant in the county housing rehabilitation program. If a county submits a housing rehabilitation program application that includes the rehabilitation of housing units in incorporated cities, then the county cannot submit another single jurisdiction application or be a participating jurisdiction in a multi-jurisdiction application submitted under the same TxCDBG fund category.~~]

(C) [~~(D)~~] An application from an eligible city or county for a project that would primarily benefit another city or county that was not meeting the TxCDBG application threshold requirements would be considered ineligible.

(2) Multi jurisdiction applications. Subject to each participating community satisfying the application requirements of the TxCDBG fund under which the application is submitted and this paragraph, an application will be accepted from two or more units of general local government if the application clearly demonstrates that the proposed activities will mutually benefit the residents of the communities applying for funds. A multi-jurisdiction application solely for administrative convenience will not be accepted. Any community participating in a multi-jurisdiction application may not submit a single jurisdiction application under the project fund for which the multi-jurisdiction application was submitted. One of the participating communities must be primarily accountable to the Office and the TDA, in instances where the TCF is accessed, for financial compliance and program performance; however, all entities participating in the multi-jurisdiction application will be accountable for application threshold compliance. Only one unit of general local government may be the official applicant and this applicant must enter into a legally binding cooperation agreement with each participant that incorporates TxCDBG requirements. A proposed project which is located in more than one jurisdiction or in which beneficiaries from more than one jurisdiction will be counted must be submitted as a multi-jurisdiction application (except as specified for the TCF and single jurisdiction applications described in paragraph (1)(A) - (C) [~~(D)~~] of this subsection).

(d) - (e) (No change.)

(f) Citizen Participation.

(1) (No change.)

(2) Application requirements. Prior to submitting a formal application, an applicant for TxCDBG funding shall satisfy the following requirements.

(A) - (E) (No change.)

[~~(F) The second public hearing for a housing infrastructure fund application must include a discussion with citizens on the proposed project, including the locations and the project activities, the amount of funds being requested, and the estimated amount of funds proposed for activities that will benefit low and moderate income persons. The published notice for this public hearing must include the location and hours when the application is available for review.~~]

(F) [~~(G)~~] Any public hearing held prior to submission of the application must be held after 5:00 p.m. on a weekday or at a convenient time on a Saturday or Sunday.

(3) - (5) (No change.)

(g) Appeals. An applicant for funding under the TxCDBG may appeal the disposition of its application in accordance with this subsection.

(1) (No change.)

(2) The appeal must be submitted in writing to the TxCDBG of the Office no later than 30 days after the date the announcement of community development fund[~~, community development supplemental fund~~] and planning/capacity building fund contract awards is published in the *Texas Register.* In addition, timely appeals not submitted in writing at least five working days prior to the next regularly scheduled meeting of the state review committee will be heard at the subsequent meeting of the state review committee. The Office staff will evaluate the appeal and may either concur with the appeal and make an appropriate adjustment to the applicant's scores, or disagree with the appeal and prepare an appeal file for consideration by the state review committee at its next regularly scheduled meeting. The state review committee will make a final recommendation to the executive director of the Office. The decision of the executive director of the Office is final. If the appeal concerns a TCF application, the appeal must be submitted in writing to the TDA no later than 10 days following the date of the notification letter of the denial. If the appeal concerns a disaster relief fund or urgent need fund application, the appeal must be submitted in writing to the Office no later than 30 days following the date of the notification letter of the denial. [~~If the appeal concerns a small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, housing fund, colonia fund or Young v. Martinez fund application, the appeal must be submitted in writing to the Office no later than 30 days after the date the announcement of contract awards is published in the *Texas Register.*~~] The staff of either the Office or the TDA, when appropriate, evaluates the appeal and may either concur with the appeal or disagree with the appeal and prepare an appeal file for consideration by the appropriate executive director. The executive director, of the agency with which the appeal was filed, then considers the appeal within 30 days and makes the final decision.

(3) In the event the appeal is sustained and the corrected scores would have resulted in project funding, the application is approved and funded. If the appeal concerning a community development fund or planning/capacity building fund application is rejected, the office notifies the applicant of its decision, including the basis for rejection after the meeting of the state review committee at which the appeal was considered. If the appeal concerns a [~~small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, Young v. Martinez fund,~~] TCF[~~, housing fund, colonia fund, disaster relief fund, small towns environment program fund, or urgent need fund~~] application, the applicant will be notified of the decision made by the appropriate executive director within ten days after the final determination by the executive director.

(4) - (5) (No change.)

(h) - (i) (No change.)

(j) False information. If an applicant provides false information in its community development fund or planning/capacity building fund application which has the effect of increasing the applicant's competitive advantage, the number of beneficiaries, or the percentage of low to moderate income beneficiaries, the Office refers the matter to the state review committee for disciplinary action. If the applicant provides false information in a [~~small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, Young v. Martinez fund,~~] colonia fund, disaster relief fund, [~~housing fund,~~] small towns environment program fund, or urgent need fund application, the Office staff shall make a recommendation for action to the executive director of the Office. If the applicant provides false information in a TCF application, TDA staff shall make a recommendation for action to the appropriate executive director. The state review committee makes a recommendation for action to the executive director of the Office at its next regularly scheduled meeting. Documentation of false information must be submitted at least ten business days prior to the next regularly scheduled meeting of the state review committee to be considered at that meeting. Recommendations that the state review committee or executive director may make include, but are not limited to:

(1) - (3) (No change.)

(k) Substitution of standardized data. Any applicant that chooses to substitute locally generated data for standardized information available to all applicants must use the survey instrument provided by the Office and must follow the procedures prescribed in the instructions to the survey instrument. This option does not apply to applications submitted to the TCF.

(1) - (3) (No change.)

(4) The applicant must demonstrate a 100% effort in contacting households to be surveyed and obtain at least an 80% response rate for surveys [~~which include 150 or fewer beneficiary households or obtain at least a 70% response rate for surveys which include 151 or more beneficiary households~~].

(5) A survey that was completed on or after January 1, 2004 [~~January 1, 1993, or January 1, 1994, or January 1, 1995,~~] for a previous TxCDBG application may be accepted by the Office for a new application to the extent specified in the most recent application guide for the proposed project.

(l) - (r) (No change.)

(s) Funds recaptured from withdrawn awards. For an award that is withdrawn from an application, the Office follows different procedures for the use of those recaptured funds depending on the fund category where the award is withdrawn.

(1) - (2) (No change.)

[~~(3) Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive an award from the first year allocation. Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year allocation. Any funds remaining from the second year allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the statewide competition. Any funds remaining from the second year allocation that are not accepted by an applicant from the statewide competition or that are not offered to an applicant from the statewide competition are then subject to the procedures described in subsection (l) of this section.~~]

(3) [~~(4)~~] Funds recaptured under the colonia construction fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(4) [~~(5)~~] Funds recaptured under the colonia planning fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(5) [~~(6)~~] Funds recaptured under the program year allocation for the colonia economically distressed areas program fund from the withdrawal of an award remain available to potential colonia economically distressed areas program fund applicants during that program year. Any funds remaining from the program year allocation that are not used to fund colonia economically distressed areas program fund applications within twelve months after the Office receives the federal letter of credit would remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

[~~(7) Funds recaptured under the housing infrastructure fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.~~]

(6) [~~(8)~~] Funds recaptured under the program year allocation for the disaster relief/urgent need fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(7) [~~(9)~~] Funds recaptured under the small towns environment program fund (STEP) from the withdrawal of an award will be made available in the next round of STEP competition following the withdraw date in the same program year. If the withdrawn award had been made in the last of the two competitions in a program year, the funds would go to the next highest scoring applicant in the same STEP competition. If there are no unfunded STEP applicants, then the recaptured funds would be available for other TxCDBG fund categories. Any unallocated STEP funds are subject to the procedures described in subsection (l) of this section.

[~~(10) Funds recaptured under the microenterprise loan fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.~~]

[~~(11) Funds recaptured under the small business loan fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.~~]

(8) [~~(12)~~] Funds recaptured under the Texas Capital Fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

[~~(13) Funds recaptured under the community development supplemental fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive an award from the first year regional allocation. Funds recaptured under the community development supplemental fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year regional allocation. Any funds remaining from the second year regional allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the region as long as the amount of funds still available exceeds the minimum community development supplemental fund grant amount. Any funds remaining from the second year regional allocation that are not accepted by an applicant from the region or that are not offered to an applicant from the region may be used for other TxCDBG fund categories and, if unallocated to another fund, are then subject to the procedures described in subsection (l) of this section. This process would also apply to an application under the community development supplemental fund that received a portion of its funds from community development marginal funds. The community development marginal funds would be provided to the replacement application.~~]

(9) [~~(14)~~] For both the community development fund [~~and community development supplemental fund (including applications funded with a portion from each of the two funds)~~], if there are no remaining unfunded eligible applications in the region from the same biennial application period to receive the withdrawn funding, then the withdrawn funds are considered as deobligated funds, subject to the procedures described in subsection (l) of this section.

[~~(15) Funds recaptured under the Non-border Colonia Fund from the withdrawal of an award remain available to potential Non-Border Colonia Fund applicants during that program year and, if~~

unallocated within the non-border colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures described in subsection (l) of this section.]

(t) - (aa) (No change.)

§255.2. Community Development Fund.

(a) General provisions. This fund covers housing, public facilities, and public service projects. Eligible units of general local government may apply for funding of a single purpose project such as housing assistance, sewer improvements, water improvements, drainage, roads, or community centers, or for a multi-purpose project which consists of any combination of such eligible activities. An application submitted for the community development fund can receive a grant from the community development fund regional allocation and/or from the community development supplemental fund regional allocation.

(1) An applicant may not submit a single jurisdiction application or be a participant in a multi-jurisdiction application under this fund and also submit a single jurisdiction application or be a participant in a multi-jurisdiction application submitted under any other TxCDBG fund category at the same time if the proposed activity under each application is the same or substantially similar. [However, an application submitted for the community development fund is also considered for the regional allocation for the community development supplemental fund.]

(2) - (3) (No change.)

(b) Funding cycle. This fund is allocated to eligible units of general local government on a biennial basis for the 2009 and 2010 [2007 and 2008] program years pursuant to regional competitions held for the 2009 [2007] program year applicants. Applications for funding must be received by the TxCDBG by the dates and times specified in the most recent application guide for this fund.

(c) Allocation plan.

(1) (No change.)

(2) Each state planning region is provided with a 2009 [2007] program year community development fund target allocation [and an additional 2007 program year community development supplemental fund target allocation] and a 2010 [2008] program year community development fund target allocation [and an additional 2008 program year community development supplemental fund target] allocation for applications in the region that are ranked through the 2009 [2007] program year regional competitions in accordance with a shared scoring system involving the Office and the regional review committees. [The regional allocation formula for the community development supplemental fund is described in §255.15(c) of this title (relating to Community Development Supplemental Fund).]

(A) The community development fund regional allocations for the first and second years of the biennial process are awarded first in each region based on the community development fund selection criteria that includes each regional review committee and the Office (10% of maximum possible score for each RRC) scoring criteria. [the 700 available points that are awarded by the Office (350 points) and each regional review committee (350 points).] Where the remainder of the 2009 [2007] program year community development fund target allocation is insufficient to completely fund the next highest ranked applicant, the applicant receives complete funding of the original grant request through either 2009 [2007] and 2010 [2008] program year funds. The [Where the remainder of the 2006 program year community development fund target allocation is insufficient to completely fund the next ranked application, the Office works with the affected applicant to determine whether partial funding is feasible. If partial funding is not feasible, the] remaining funds from all the target allocations are pooled to fund projects from among the highest ranked, unfunded applications from each of the 24 state planning regions. Selection criteria for such applications will consist of the selection criteria scored by the Office under this fund. Marginal applicants' community distress scores are recomputed based on the applicants competing in the marginal pool competition only.

(B) Due to the two-year funding cycle proposed for program years 2009 and 2010, a Community Development Fund pooled marginal competition will not be conducted for program year 2009. A pooled marginal competition may be conducted for program year 2010 using available funds if the State's 2010 allocation is not decreased significantly from the State's estimated 2010 Community Development allocation. All applicants whose marginal amount available is under $75,000 will automatically be considered under this competition. When the marginal amount left in a regional allocation is equal to or above the TxCDBG grant minimum of $75,000, the marginal applicant may scale down the scope of the original project design, and accept the marginal amount, if the reduced project is still feasible. Alternatively, such marginal applicants may choose to compete under the pooled marginal fund competition for the possibility of full project funding. This fund consists of all regional marginal amounts of less than $75,000, any funds remaining from regional allocations where the number of fully funded eligible applicants does not utilize a region's entire allocation and the contribution of marginal amounts larger than $75,000 from those applicants opting to compete for full funding rather than accept their marginal amount. The scoring factors used in this competition are the TxCDBG Community Development Fund factors scored by TxCDBG staff with the following adjustments:

(i) Past Selection (10 points)--Ten (10) points are awarded to each applicant that did not receive a 2007 or 2008 Community Development Fund or Community Development Supplemental Fund contract award;

(ii) Past Performance (25 points)--Up to 25 points;

(iii) Community Distress (55 points)--55 Points Maximum (Percentage of persons living in poverty 25 points; Per Capita Income 20 points; Unemployment Rate 10 points).

[(B) The remaining applicants in the region that are not recommended to receive awards from the community development fund 2007 and 2008 regional allocations are then ranked to receive the community development supplemental fund regional allocations for the first and second years of the biennial process based on the community development supplemental fund selection criteria that includes the 360 available points that are awarded by the Office (10 points based on the applicant's past performance on previously awarded TxCDBG contracts) and each regional review committee (350 points).]

[(C) The community development fund marginal funds available from the 2008 regional allocation may be used to fund an application that is recommended to receive only a portion of the original grant request from the community development supplemental fund regional allocation.]

[(D) If there are insufficient funds available from the first year's community development supplemental fund regional allocation to fully fund an application, then the applicant may accept the amount available or wait for full funding in the second year by combining the regional allocations available for the two years.]

[(E) If there are insufficient funds available from the 2005 and 2006 community development supplemental fund regional allocations, then any funds available from the 2006 community development fund regional allocation marginal funds may be used to fully fund the application. If marginal funds are not available to fully fund

~~the application, the applicant may accept the amount of the funds available or, if declined, the funds will be part of the marginal competition.]~~

(3) Each Regional Review Committee is encouraged to allocate a percentage or amount of its Community Development Fund allocation to housing projects and, for RRCs in eligible areas, non-border colonia projects proposed in and for that region. Under a set-aside, the highest ranked applications for a housing or non-border colonia activity, regardless of the position in the overall ranking, would be selected to the extent permitted by the housing or non-border colonia set-aside level. If the region allocates a percentage of its funds to housing and/or non-border colonia activities and applications conforming to the maximum and minimum amounts are not received to use the entire set-asides, the remaining funds may be used for other eligible activities. (Under a housing and/or non-border colonia set-aside process, a community would not be able to receive an award for both a housing or non-border colonia activity and an award for another Community Development activity during the biennial process. Housing projects/activities must conform to eligibility requirements in 42 U.S.C. Section 5305 and applicable HUD regulations.)

~~[(3) Each regional review committee may allocate approximately 8%, or a greater or lesser percentage, of its community development fund allocation to housing projects proposed in and for that region. Under a housing allocation, the highest ranked applications for housing activities, regardless of the position in the overall ranking, would be selected to the extent permitted by the housing allocation level. If the regional review committee allocates a percentage the region's funds to housing and applications conforming to the maximum and minimum amounts are not received to use the entire housing allocation, the remaining funds may be used for other eligible activities.]~~

(d) Selection procedures.

(1) Prior to the submission deadline specified in the most recent application guide for this fund, each eligible unit of general local government may submit one application to the Office for funding under the [~~combined~~] community development fund [~~and community development supplemental fund~~] regional allocations. Two copies of the application must be submitted to the Office. [~~Each applicant must also provide at least one copy of its application to the applicant's regional review committee within three weeks after the Office submission deadline.~~]

(2) (No change.)

(3) Each Regional Review Committee is responsible for determining local project priorities and objective factors for all its scoring components based on public input. The RRC shall establish the numerical value of the points assigned to each scoring factor and determine the total combined points for all RRC scoring factors. The RRCs are responsible for convening public hearings to discuss and select the objective scoring factors that will be used to score applications at the regional level. The public must be given an opportunity to comment on the priorities and the scoring criteria considered. The final selection of the scoring factors is the responsibility of each RRC. Each RRC shall develop a Regional Review Committee Guidebook, in the format provided by TxCDBG staff, to notify eligible applicants of the objective scoring factors and other RRC procedures for the region. The RRC must clearly indicate how responses would be scored under each factor and use data sources that are verifiable to the public. After the RRC's adoption of its scoring factors, the score awarded to a particular application under any RRC scoring factor may not be dependent upon an individual RRC member's judgment or discretion. (This does not preclude collective RRC action that the state TxCDBG has approved under any appeals process.)

(4) The RRC shall select one of the following entities to develop the RRC Guidebook, calculate the RRC scores, and provide other administrative RRC support: Regional Council of Governments (COG), or TxCDBG staff or TxCDBG designee, or A combination of COG and TxCDBG staff or TxCDBG designee.

(5) The RRC Guidebook should be adopted by the RRC and approved by TxCDBG staff at least 90 days prior to the application deadline. The selection of the entity responsible for calculating the RRC scores must be identified in the RRC Guidebook and must define the role of each entity selected. The Office shall be responsible for reviewing all scores for accuracy and for determining the final ranking of applicants once the RRC and TxCDBG scores are summed. The RRC is responsible for providing to the public the RRC scores, while the TxCDBG is responsible for publishing the final ranking of the applications.

~~[(3) Each regional review committee shall hold a scoring meeting in accordance with the procedures specified in the Office's regional review committee guidebook and in accordance with the procedures and priorities previously established by each regional review committee. Each regional review committee must provide every applicant within its region with an opportunity to make a presentation before the regional review committee. The regional review committee will then score the regional review committee scoring factors.]~~

~~[(4) Following the resolution of any appeals from actions of the regional review committees as specified in §255.8 of this title (relating to Regional Review Committees) the Office adds scores relating to community distress, benefits to low-and moderate-income persons, project impact, other considerations, and match to the regional review committees' scores to determine regional rankings. Scores on the factors in these categories are derived from standardized data from the U.S. Census Bureau, Texas Workforce Commission, and from information provided by the applicant.]~~

(6) [~~(5)~~] Following a final technical review, the Office staff presents the funding recommendations for the 2009 and 2010 [~~2007 and 2008~~] community development fund [~~and community development supplemental fund~~] regional allocations to the state review committee. Office staff makes a site visit to each of the applicants recommended for funding prior to the completion of contract agreements.

(7) [~~(6)~~] In consultation with the executive director and TxCDBG office staff, the state review committee reviews and approves grant and loan applications and associated funding awards of eligible counties and municipalities.

(8) [~~(7)~~] An applicant for a grant, loan, or award under a community development block grant program may appeal a decision of the state review committee by filing a complaint with the Board. The Board will hold a hearing on a complaint filed with the board and render a decision.

(9) [~~(8)~~] Upon announcement of the 2009 and 2010 [~~2007~~] program year contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded with the remainder of the target allocation within a region.

~~[(9) Upon announcement of the 2006 program year contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of~~

~~the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded with the remainder of the target allocation within a region.~~]

(e) Selection criteria. The following is an outline of the selection criteria used by the Office and the regional review committees for scoring applications under the community development fund. [~~Seven hundred points are available.~~]

(1) Regional Review Committee (RRC) Objective Scoring-Each Regional Review Committee is responsible for determining local project priorities and objective factors for all its scoring components based on public input.

(A) Maximum RRC Points Possible: The RRC shall establish the numerical value of the points assigned to each scoring factor and determine the total combined points for all RRC scoring factors.

(B) RRC Selection of the Scoring Factors: The RRCs are responsible for convening public hearings to discuss and select the objective scoring factors that will be used to score applications at the regional level. The public must be given an opportunity to comment on the priorities and the scoring criteria considered. The final selection of the scoring factors is the responsibility of each RRC.

(i) Each RRC shall develop a Regional Review Committee Guidebook, in the format provided by TxCDBG staff, to notify eligible applicants of the objective scoring factors and other RRC procedures for the region.

(ii) The RRC must clearly indicate how responses would be scored under each factor and use data sources that are verifiable to the public. After the RRC's adoption of its scoring factors, the score awarded to a particular application under any RRC scoring factor may not be dependent upon an individual RRC member's judgment or discretion. (This does not preclude collective RRC action that the state TxCDBG has approved under any appeals process.)

(2) State Scoring (TxCDBG Staff Scoring)--Other Considerations--Maximum Points--10% of Maximum Possible Score for Each RRC.

(A) Past Selection--Maximum Points--2% of Maximum Possible RRC Score for each region--are awarded to each applicant that did not receive a 2007 or 2008 Community Development Fund or Community Development Supplemental Fund contract award.

(B) Past Performance--Maximum Points--4% of Maximum Possible RRC Score for each region. An applicant can receive points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's most recent TxCDBG contract that has reached the end of the original contract period stipulated in the contract within the past 4 years (for CD/CDS contracts only the 2003/2004 and 2005/2006 cycle awards will be considered). The TxCDBG will also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. Applicants that have never received a TxCDBG grant award will automatically receive these points. The TxCDBG will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. (Adjustments may be made for contracts that are engaged in appropriately pursuing due diligence such as bonding remedies or litigation to ensure adequate performance under the TxCDBG contract.) The evaluation of an applicant's past performance will include the following:

(i) The applicant's completion of the previous contract activities within the original contract period.

(ii) The applicant's submission of all contract reporting requirements such as Quarterly Progress Reports.

(iii) The applicant's submission of the required close-out documents within the period prescribed for such submission.

(iv) The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs.

(v) The applicant's timely response to audit findings on previous TxCDBG contracts.

(vi) The expenditure timeframes on the applicable TxCDBG contracts.

(C) Benefit To Low/Moderate-Income (LMI) Persons--Applications that meet the Low and Moderate Income National Objective for each activity (51 percent low/moderate-income benefit for each activity within the application) will receive 2% of the Maximum Possible RRC Score for each region.

(D) Cost per Household (CPH)--The total amount of TxCDBG funds requested by the applicant is divided by the total number of households benefiting from the application activities to determine the TxCDBG cost per household. (Use pro rata allocation for multiple activities.)--Up to 2% of the Maximum RRC Score for each region.

(i) Cost per household is equal to or less than $8,750--2%.

(ii) Cost per household is greater than $8,750 but equal to or less than $17,500--1.75%.

(iii) Cost per household is greater than $17,500 but equal to or less than $26,500--1.25%.

(iv) Cost per household is greater than $26,500 but equal to or less than $35,000--0.5%.

(v) Cost per household is greater than $35,000--0%.

(E) When necessary, a weighted average is used to score to applications that include multiple activities with different beneficiaries. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for administration, a percentage of the total TxCDBG construction and engineering dollars for each activity is calculated. Administration dollars requested is applied pro-rata to these amounts. The percentage of the total TxCDBG dollars for each activity is then multiplied by the appropriate score and the sum of the calculations determines the score. Related acquisition costs are applied to the associated activity.

(F) Maximum State points--the calculated maximum score is rounded to a whole integer, with Past Selection, Past Performance, and LMI being rounded to a whole integer and CPH points being the difference.

(G) The RRC may not adopt scoring factors that directly negate or offset these state factors.

(f) If the Regional Review Committee for a region fails to adopt an Objective Methodology for the Program Year 2009 and 2010 Community Development Fund the following scoring criteria will apply: The RRC's Project Priorities taken from the TxCDBG-approved

RRC Scoring Guidelines for the region for the 2007-2008 CD/CDS cycle.

(1) Regional Review Committee Project Priorities (100 points) The RRC's Project Priorities taken from the TxCDBG-approved RRC Scoring Guidelines for the region for the 2007-2008 CD/CDS cycle. (Adjusted if necessary for an objective methodology as described in the PY 2009 TxCDBG Action Plan.)

(2) [~~(1)~~] Community distress (total--55 points). All community distress factor scores are based on the population of the applicant. An applicant that has 125% or more of the average of all applicants in its region of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in its region on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in its region on the per capita income factor will receive the maximum number of points available for that factor:

(A) percentage of persons living in poverty--25

(B) per capita income--20

(C) unemployment rate--10

(3) [~~(2)~~] Benefit to low- and moderate-income persons (total--20 [~~40~~] points).Applications that meet the Low and Moderate Income National Objective for each activity (51 percent low/moderate-income benefit for each activity within the application) will receive 20 points. [~~An application in which at least 60% of the Texas Community Development Block Grant Program funds requested benefit low and moderate income persons receives 40 points.~~]

(4) [~~(3)~~] Project impact (total--175 points).

(A) Information submitted in the application or presented to the Regional Review Committees is used by a committee composed of TxCDBG staff to generate scores on the Project Impact factor. Multi-activity projects which include activities in different scoring ranges receive a combination score within the possible range. Each application is scored by a committee composed of TxCDBG staff. Each committee member separately evaluates an application and assigns a score within a predetermined scoring range based on the application activities. The separate scores are then totaled and the application is assigned the average score. The scoring ranges used for Project Impact scoring are: [~~Each application is scored within a point range based on the application activities. Multi-activity projects which include activities in different scoring ranges will receive a combination score within the possible range. Information submitted in the application or presented to the regional review committees is used by a committee composed of staff of the Office to generate scores on this factor. The point ranges used for project impact scoring are as follows:~~]

(i) water activities, sewer activities, and housing activities (145 to 175 points);

(ii) eligible public facilities in a defense economic readjustment zone (145 to 175 points);

(iii) street paving, drainage, flood control and handicapped accessibility activities (130 to 160 points);

(iv) fire protection, health clinic activities, and facilities providing shelter for persons with special needs (125 to 145 points);

(v) community center, senior citizens center, social services center, demolition/clearance, and code enforcement activities (115 to 135 points);

(vi) gas facilities, electrical facilities, and solid waste disposal activities (110 to 130 points);

(vii) access to basic telecommunications, jail facilities and detention facilities (105 to 125 points);

(viii) all other eligible activities (85 to 115 points).

(B) Other factors that will be evaluated by Office staff in the assignment of project impact scores within the point ranges for activities include, but are not limited to, the following:

(i) each application is scored based on how the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction;

(ii) projects that address basic human needs such as water, sewer, and housing generally are scored higher than projects addressing other eligible activities;

(iii) projects that provide a first-time public facility or service generally receive a higher score than projects providing an expansion or replacement of existing public facilities or services;

(iv) public water and sewer projects that provide a first-time public facility or service generally receive a higher score than other eligible first-time public facility or service projects;

(v) projects designed to bring existing services up to at least the state minimum standards as set by the applicable regulatory agency are given additional consideration;

(vi) For water and sewer projects addressing state regulatory compliance issues, the extent to which the issue was unforeseen;

(vii) projects designed to address drought-related water supply problems are generally given additional consideration;

(viii) water and sewer projects that provide first-time water or sewer service through a privately-owned for-profit utility or an expansion/improvement of the existing water or sewer service provided through a privately-owned for-profit utility may, on a case-by-case basis, receive less consideration than the consideration given to projects providing these services through a public nonprofit organization.

(ix) Projects designed to conserve water usage may be given additional consideration.

(x) Water and sewer projects from applicants that demonstrate a long term commitment to reinvestment in the system and sound management of the system may be given additional consideration (including those that have remained in compliance with health and Texas Commission on Environmental Quality (TCEQ) system requirements).

(xi) Consideration will be given to those water and sewer systems that have agreed to undertake improvements to their systems that TCEQ's recommendation but are not under an enforcement order because of this agreement.

(xii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed.

(xiii) Projects that use renewable energy technology for not less than 10% of the total energy requirements (excluding the purchase of energy from the electric grid that was produced with renewable energy).

(5) [~~(4)~~] Matching Funds (total--60 points). An applicant's matching share may consist of one or more of the following contributions: cash; in-kind services or equipment use; materials or supplies; or land. An applicant's match is considered only if the contributions are used in the same target areas for activities directly related to the activities proposed in its application; if the applicant demonstrates that its matching share has been specifically designated for use in the activities proposed in its application; and if the applicant has used an acceptable and reasonable method of valuation. The population category under which county applications are scored depends on the project type and the beneficiary population served. If the project benefits residents of the entire county, the total population of the county is used. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the residents of the entire unincorporated area of the county. For county applications addressing water and sewer improvements in unincorporated areas, the population category is based on the actual number of beneficiaries to be served by the project activities. The population category under which multi-jurisdiction applications are scored is based on the combined populations of the participating applicants according to the 2000 census. Applications for housing rehabilitation and for affordable new permanent housing for low- and moderate-income persons receive the 60 points without including any matching funds. This exception is for housing activities only. Sewer or water service line/connections are not counted as housing rehabilitation. Demolition/clearance and code enforcement, when done in the same target area are counted as part of the housing rehabilitation activity. When demolition/clearance and code enforcement are proposed without housing rehabilitation activities, then the match score is still based on actual matching funds committed by the applicant. Applications which include additional activities, other than related housing activities, are scored based on the percentage of match provided for the additional activities. Program funds cannot be used to install street/road improvements in areas that are not currently receiving water or sewer service from a public or private service provider unless the applicant provides matching funds equal to at least 50% of the total construction cost budgeted for the street/road improvements. This requirement will not apply when the applicant provides assurance that the street/road improvements proposed in the application will not be impacted by the possible installation of water or sewer lines in the future because sufficient easements and rights-of-way are available for the installation of such water or sewer lines. The terms used in this paragraph are further defined in the current application guide for this fund.

(A) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(i) match equal to or greater than 5.0% of grant request--60 points;

(ii) match at least 4.0% but less than 5.0% of grant request--40 points;

(iii) match at least 3.0% but less than 4.0% of grant request--20 points;

(iv) match at least 2.0% but less than 3.0% of grant request--10 points;

(v) match less than 2.0% of grant request--0 points.

(B) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(i) match equal to or greater than 10% of grant request--60 points;

(ii) match at least 7.5% but less than 10% of grant request--40 points;

(iii) match at least 5.0% but less than 7.5% of grant request--20 points;

(iv) match at least 2.5% but less than 5.0% of grant request--10 points;

(v) match less than 2.5% of grant request--0 points.

(C) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(i) match equal to or greater than 15% of grant request--60 points;

(ii) match at least 11.5% but less than 15% of grant request--40 points;

(iii) match at least 7.5% but less than 11.5% of grant request--20 points;

(iv) match at least 3.5% but less than 7.5% of grant request--10 points;

(v) match less than 3.5% of grant request--0 points.

(D) Applicants with populations over 5,000 according to the 2000 census:

(i) match equal to or greater than 20% of grant request--60 points;

(ii) match at least 15% but less than 20% of grant request--40 points;

(iii) match at least 10% but less than 15% of grant request--20 points;

(iv) match at least 5.0% but less than 10% of grant request--10 points;

(v) match less than 5.0% of grant request--0 points.

(6) [~~(5)~~] Other considerations (total--40 [~~20~~] points). An applicant receives up to 40 [~~20~~] points on the following three factors.

(A) Past Selection (10 points)--10 points are awarded to each applicant that did not receive a 2007 or 2008 Community Development Fund or Community Development Supplemental Fund contract award. [~~Ten of the 20 points available are awarded to applicants that did not receive a community development fund or a housing rehabilitation fund contract award during the 2005 and 2006 program years.~~]

(B) Past Performance (total--20 points). An applicant can receive from thirty (30) to zero (0) points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's most recent TxCDBG contract that has reached the end of the original contract period stipulated in the contract within the past 4 years. The TxCDBG will also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. Applicants that have never received a TxCDBG grant award will automatically receive these points. The TxCDBG will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance will include the following: [~~An applicant receives from zero to ten points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will primarily be based on an assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. TxCDBG staff may also assess the applicant's performance on existing TxCDBG contracts that have~~

not reached the end of the original contract period. An applicant that has never received a TxCDBG grant award will automatically receive these points. TxCDBG staff will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance on TxCDBG contracts after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance will include, but is not necessarily limited to the following:]

(i) The applicant's completion of the previous contract activities within the original contract period.

(ii) The applicant's submission of all contract reporting requirements such as Quarterly Progress Reports.

(iii) [(ii)] The applicant's submission of the required close-out documents within the period prescribed for such submission.

(iv) [(iii)] The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs.

(v) [(iv)] The applicant's timely response to audit findings on previous TxCDBG contracts.

[(v) The applicant's submission of all contract reporting requirements such as quarterly progress reports, certificates of expenditures, and project completion reports.]

(vi) The expenditure timeframes on the applicable TxCDBG contracts.

(C) Cost per Household (total--10 points). The total amount of TxCDBG funds requested by the applicant is divided by the total number of households benefiting from the application activities to determine the TxCDBG cost per beneficiary. (Use pro rata allocation for multiple activities.) When necessary, a weighted average is used to score to applications that include multiple activities with different beneficiaries. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for administration, a percentage of the total TxCDBG construction and engineering dollars for each activity is calculated. Administration dollars requested is applied pro-rata to these amounts. The percentage of the total TxCDBG dollars for each activity is then multiplied by the appropriate score and the sum of the calculations determines the score. Related acquisition costs are applied to the associated activity.

(i) Cost per beneficiary is equal to or less than $8,750--10 points.

(ii) Cost per beneficiary is greater than $8,750 but equal to or less than $17,500--8 points.

(iii) Cost per beneficiary is greater than $26,500 but equal to or less than $26,500--5 points.

(iv) Cost per beneficiary is greater than $26,500 but equal to or less than $35,000--2 points.

(v) Cost per beneficiary is greater than $35,000--0 points.

[(6) Regional scoring factors (total--350 points). Each regional review committee shall use the following three factors to score applications in its region:]

[(A) Project priorities. Each regional review committee shall rank and assign points to categories of eligible activities based on the priority of such projects in the region. The first priority shall receive at least 100 points.]

[(B) Local effort. A minimum of 75 points shall be made available based on definitions and criteria adopted by each regional review committee. The regional review committee must establish the methods its members will use to score this factor, consistent with HUD regulations as determined by TxCDBG.]

[(C) Merits of the project. A maximum of 175 points shall be awarded based on definitions and criteria adopted by each regional review committee. The regional review committee must establish the methods its members will use to score this factor, consistent with HUD regulations as determined by TxCDBG.]

[(f) Project impact scoring. Formation submitted in the application and information presented to each Regional Review Committee and the TxCDBG will be used by ORCA staff to generate scores on the Project Impact factor. The maximum Project Impact score is 175 points and an applicant can receive a score as low as 85 points. Scoring ranges have been established for eligible activities. A weighted average is used to assign scores to applications that include activities in the different Project Impact scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction and acquisition dollars for each activity will be calculated. The percentage of the total TxCDBG construction dollars for each activity will then be multiplied by the appropriate Project Impact point level. The sum of these calculations determines the composite Project Impact score.]

[(1) Supplemental information may be presented orally to the RRC during the RRC scoring meeting. But any additional information that an applicant wishes to submit for Project Impact scoring consideration, must be submitted in a written/printed format. Additional written/printed information presented to the RRC or the TxCDBG will be accepted up to the date of each RRC scoring meeting. The additional information must be presented to the TxCDBG representative attending the RRC scoring meeting or received in the TxCDBG office by the date of the RRC scoring meeting. Information received by the RRC or the TxCDBG after the date of the RRC scoring meeting will not be considered by the TxCDBG in the scoring of this factor.]

[(2) The score for water and sewer activities that benefit privately-owned for-profit water and sewer systems will be reduced by five points, except for instances when a Project Impact score is specifically assigned to a water or sewer activity that is provided through a privately-owned for-profit utility.]

[(3) Water, sewer and housing activities--145 to 175 points.]

[(A) Water activities.]

[(i) First-time public water service to an area that includes more than 25 new residential connections--169 points]

[(ii) Project addressing situation that meets TxCDBG urgent need criteria with back-up letter from the Texas Department of State Health Services or other applicable state agency citing the conditions creating the threat to public health and safety--169 points]

[(iii) First-time public water service to an area that includes 11 to 25 new residential connections--167 points]

[(iv) Applicant is addressing deficiencies cited in an active Agreed Order/Enforcement Order with fines included (application must indicate whether cited violation has been resolved)--164 points]

[(v) Applicant is addressing deficiencies cited in an active Agreed Order/Enforcement Order without fines included (appli-

cation must indicate whether cited violation has been resolved)--164 points]

[(vi) First-time public water service to an area that includes 10 or fewer new residential connections--164 points]

[(vii) Addressing drought conditions through additional water supply or water storage and water system is on the TCEQ drought watch list within the last 4 months prior to the application due date), and the supply problems are not related to substantial water loss from deteriorated lines (must include with the application the notice to citizens and the criteria used to be on the drought list)--161 points]

[(viii) First-time water service to an area through a privately-owned for-profit--161 points]

[(ix) Water supply/treatment improvements that are still needed to meet state minimum standards cited in the most recent TCEQ water system inspection letter--165 points]

[(x) Water storage improvements that are still needed to meet state minimum standards cited in the most current TCEQ water system inspection letter--158 points]

[(xi) Replacing undersized water lines and removing the presence of lead, or contamination that has a regulatory standard to meet state minimum water pressure standards cited in the most recent TCEQ water system inspection letter and the conditions cited still exist--158 points]

[(xii) Addressing drought conditions by replacing water lines that contribute to a significant loss of water supply; provided the water supply loss is documented by the applicant and the water system is on the current TCEQ drought watch list (within the last 4 months prior to the application due date. Must include with the application the notice to citizens and criteria used to be on the drought list)--157 points]

[(xiii) Water storage improvements to meet state minimum standards, documented through independent quantifiable information, and the conditions still exist--155 points]

[(xiv) Water supply/treatment improvements to meet state minimum standards, documented through independent quantifiable information, and the conditions still exist--155 points]

[(xv) Replacement of water lines with larger diameter water lines to meet minimum state standards for water pressure cited in the most recent TCEQ water system inspection letter, and the conditions cited still exist--155 points]

[(xvi) Replacement of water lines with larger diameter water lines to meet minimum state standards for water pressure and/or number of connections and documented through independent quantifiable information, and the conditions still exist--153 points]

[(xvii) Water supply, storage or treatment improvements without independent quantifiable information or a TCEQ water system inspection letter documenting that the activity is addressing state minimum standards--149 points]

[(xviii) Replacement of water lines with larger diameter water lines to improve service without independent quantifiable information or a TCEQ water system inspection letter documenting that the replacement activity is addressing state minimum standards--148 points]

[(xix) Replacement of water lines with the same diameter size water lines--147 points]

[(xx) Water service problems associated with written complaints not addressed elsewhere in this section--146 points]

[(xxi) Other eligible water activities--145 points]

[(xxii) Water supply is defined as reservoirs (lakes (surface water), aquifers) or ground storage reservoirs, wells, or an independent wholesale supplier that feeds into treatment facilities (conveyance to plant).]

[(B) Additional subjective considerations for water activities.]

[(i) Consideration will be given to those water systems that have agreed to undertake improvements to their systems at TCEQ's recommendation but are not under an enforcement order because of this agreements--1 to five points]

[(ii) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction. First-time service would score high in the range--1 to 5 points]

[(iii) Water projects from applicants that demonstrate a long-term commitment to reinvestment in the system and sound management of the system may be given additional consideration (including those that have remained in compliance with health and TCEQ system requirements). Installation of water lines to loop the water system would be considered, however it would not receive points if also scored based on TCEQ enforcement or citations. For water projects addressing state regulatory compliance issues, the extent to which the issue was unforeseen (based on information included in state regulatory documentation or notifications to the applicant) will be considered--1 to 3 points]

[(iv) Projects designed to conserve water usage may be given additional consideration--2 points if addressing drought conditions and on the TCEQ drought watch list (within the last 3 months prior to the application due date)--1 to 2 points]

[(v) Projects that use renewable energy technology for not less than 10% of the total energy requirements, (excluding the purchase of energy from the electric grid that was produced with renewable energy)--2 points]

[(vi) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(C) Sewer activities.]

[(i) First-time public sewer service to an area that includes more than 25 new residential connections--169 points]

[(ii) Project addressing situation that meets Tx-CDBG urgent need criteria with back-up letter from the Texas Department of State Health Services or other applicable state agency citing the conditions creating the threat to public health and safety--169 points]

[(iii) Applicant is addressing deficiencies cited in an active Agreed Order/Enforcement Order with fines included--167 points]

[(iv) First-time public sewer service to an area that includes 11 to 25 new residential connections--167 points]

[(v) First-time public sewer service to an area that includes 10 or fewer new residential connections--164 points]

[(vi) Applicant is addressing deficiencies cited in an active Agreed Order/Enforcement Order without fines included--164 points]

[*(vii)* Installation of septic tanks or on-site sewer facilities to provide first-time sewer service--162 points]

[*(viii)* Applicant is addressing deficiencies cited in the most recent TCEQ sewer system notice of violations letter and the conditions cited still exist--156 points]

[*(ix)* First-time sewer service to an area through a privately-owned for-profit utility--161 points]

[*(x)* Applicant is expanding the sewer treatment plant in response to the most recent TCEQ letter stating that sewer system has reached 90% of treatment capacity and the conditions cited still exist--161 points]

[*(xi)* Applicant is expanding the sewer treatment plant in response to the most recent TCEQ letter stating that sewer system has reached 75% of treatment capacity and the conditions cited still exist--158 points]

[*(xii)* Replacing lift stations to address inflow and infiltration problems in response to the most recent TCEQ notice of violations letter citing the problem or documented through independent quantifiable information and the conditions cited still exist--157 points]

[*(xiii)* Replacement of sewer lines with new sewer lines to address sewer system overflows, blocked sewer lines, replacement of lift stations with new lift stations to address sewer system unauthorized discharges rather than inflow and infiltration problems or septic tank replacement to address problems based on independent quantifiable information--154 points]

[*(xiv)* New sewer treatment plant or expansion of existing sewer treatment plant with independent quantifiable information to provide capacity for first-time sewer services in the same application--164 points]

[*(xv)* Replacement of sewer lines with new sewer lines to address sewer system overflows, blocked sewer lines, or inflow and infiltration problems or septic tank replacement to address problems without independent quantifiable information or without a TCEQ letter documenting the problems still exist--150 points]

[*(xvi)* Replacement of lift stations with new lift stations without independent quantifiable information or without a TCEQ letter documenting the problems still exist--148 points]

[*(xvii)* New sewer treatment plant or expansion of the existing sewer treatment plant without independent quantifiable information or without a TCEQ letter documenting need for the new plant (one point extra if permit has been obtained)--149 points]

[*(xviii)* Sewer service problems associated with written complaints not covered elsewhere in this section--146 points]

[*(xix)* Other eligible sewer activities--145 points]

[*(xx)* New treatment facilities needed to replace failing treatment structure--162 points]

[*(xxi)* Installation of approved residential on-site wastewater disposal systems for failing systems that cause health issues--157 points]

[*(xxii)* New sewer treatment plant or expansion of the existing sewer treatment plant with independent quantifiable information or with a TCEQ letter documenting the need for the new plant (one point extra if permit is obtained)--157 points]

[(D) Additional subjective considerations for sewer/wastewater activities.]

[*(i)* Consideration will be given to those sewer systems that have agreed to undertake improvements to their systems at TCEQ's recommendation but are not under an enforcement order because of this agreement--1 to 5 points]

[*(ii)* How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction may be given additional consideration. First-time service would score high in the range--1 to 7 points]

[*(iii)* Sewer projects from applicants that demonstrate long-term commitment to reinvestment in the system and sound management of the system may be given additional consideration (including those that have remained in compliance with health and TCEQ system requirements). The applicant would not receive points of this criterion is scored under a category for TCEQ enforcement or citations. For sewer projects addressing state regulatory compliance issues, the extent to which the issue was unforeseen (based on information included in state and regulatory documentation or notifications to the applicant) may also be considered--2 points]

[*(iv)* Projects that use renewable energy technology for not less than 10% of the total energy requirements, (excluding the purchase of energy from the electric grid that was produced with renewable energy)--2 points]

[*(v)* Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdiction application can receive a total of one point)--1 point]

[(E) Housing activities.]

[*(i)* Housing rehabilitation addressing all housing code violations and housing guidelines will include preference to making housing units accessible for persons with disabilities--166 points]

[*(ii)* Housing rehabilitation addressing all housing code violations that do not include a preference to making housing units accessible for persons with disabilities--164 points]

[*(iii)* Construction of new housing, when eligible, for low and moderate income persons--146 points]

[*(iv)* Provision of direct assistance (such as downpayment assistance) to facilitate and expand homeownership among persons of low and moderate income--162 points]

[*(v)* Acquisition of existing housing units that will be renovated and then made available to low and moderate income persons--161 points]

[*(vi)* Housing rehabilitation addressing all housing code violations that include code enforcement and/or demolition clearance activities and housing guidelines will include a preference to making housing units accessible for persons with disabilities--169 points]

[*(vii)* Housing rehabilitation that is not addressing all housing code violations and housing guidelines will include preference to making housing units accessible for persons with disabilities--153 points]

[*(viii)* Housing rehabilitation that is not addressing all housing code violations--149 points]

[*(ix)* Other eligible housing activities--145 points]

[(F) Additional subjective considerations for housing activities.]

~~*[(i)* How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]~~

~~*[(ii)* Projects that use renewable energy technology for not less than 10% of the total energy requirements (excluding the purchase of energy from the electric grid that was produced with renewable energy)--1 point]~~

~~*[(iii)* Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdiction application can receive a total of one point)--1 point]~~

~~[(4) Eligible public facilities located in a Defense Economic Readjustment Zone--145 to 175 points.]~~

~~[(A) Public facilities projects located in a Defense Economic Readjustment Zone--169 points]~~

~~[(B) Additional subjective consideration for eligible facilities located in a Defense Economic Readjustment Zone.]~~

~~*[(i)* How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]~~

~~*[(ii)* Projects that use renewable energy technology for not less than 10% of the total energy requirements (excluding the purchase of energy from the electric grid that was produced with renewable energy)--2 points]~~

~~*[(iii)* Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]~~

~~[(5) Street paving, drainage, flood control and handicapped accessibility--130 to 160 points.]~~

~~[(A) Street paving activities.]~~

~~*[(i)* Installation of road base, asphalt or concrete surface pavement, concrete curb and gutter and storm drainage on existing unpaved streets--155 points]~~

~~*[(ii)* Installation of road base, asphalt or concrete surface pavement, and drainage structures on existing unpaved streets--153 points]~~

~~*[(iii)* Construction of new streets that include installation of road base, asphalt or concrete surface pavement, and concrete curb and gutter--155 points]~~

~~*[(iv)* Installation of road base, asphalt or concrete surface pavement, and roadside ditch improvements on existing unpaved streets--151 points]~~

~~*[(v)* Construction of new streets that include installation of road base and asphalt or concrete surface pavement--146 points]~~

~~*[(vi)* Installation of asphalt or concrete surface pavement on existing unpaved streets--144 points]~~

~~*[(vii)* Reconstruction of existing paved streets--135 points]~~

~~*[(viii)* Other eligible street paving activities--130 points]~~

~~[(B) Drainage activities.]~~

~~*[(i)* Installation of designed drainage structures for an area currently using natural terrain for drainage--155 points]~~

~~*[(ii)* Construction including changes to terrain such as unlined ditches to improve drainage for an area currently using natural terrain for drainage--150 points]~~

~~*[(iii)* Installation of designed drainage structures to replace existing drainage structures to improve the drainage for an area--145 points]~~

~~*[(iv)* Reconstruction of unlined ditches to improve drainage for an area--142 points]~~

~~*[(v)* Clearance of obstructions to unlined ditches or other drainage structures to improve drainage for an area--135 points]~~

~~*[(vi)* Other eligible drainage activities--130 points]~~

~~[(C) Flood control activities.]~~

~~*[(i)* Installation of designed flood control structures such as dams or retention ponds--155 points]~~

~~*[(ii)* Installation of retention walls, creek bed walls, storm sewers, or ditches needed to control flood water--150 points]~~

~~*[(iii)* Reconstruction of existing flood control structures--145 points]~~

~~*[(iv)* Clearance of obstructions to flood control structures--135 points]~~

~~*[(v)* Other eligible flood control activities--130 points]~~

~~[(D) Handicapped accessibility activities.]~~

~~*[(i)* Addressing all needed improvements to provide complete accessibility to a public building (complete accessibility includes handicapped parking, ramps, handrails, doorway widening, restroom modifications, water fountain modifications, access to upper and lower floors (elevator or lift) and other related improvements)--155 points]~~

~~*[(ii)* Addressing some of the needed improvements to provide complete accessibility to a public building (complete accessibility includes handicapped parking, ramps, handrails, doorway widening, restroom modifications, water fountain modifications, access to upper and lower floors (elevator or lift) and other related improvements)--145 points]~~

~~*[(iii)* Other eligible handicapped accessibility activities--130 points]~~

~~[(E) Additional subjective considerations for street paving, drainage, flood control and handicapped accessibility.]~~

~~*[(i)* How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]~~

~~*[(ii)* Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]~~

~~[(6) Fire protection, health clinics, and facilities providing shelter for persons with special needs (hospitals, nursing homes, convalescent homes)--125 to 145 points.]~~

~~[(A) Fire protection activities.]~~

~~*[(i)* Purchasing fire fighting vehicles, ambulance or EMS vehicle for fire department use--140 points]~~

~~*[(ii)* Construction of a new fire station and fire fighting vehicles and equipment--135 points]~~

[(iii) Purchasing fire fighting equipment for fire department staff--132 points]

[(iv) Construction of a new fire station only--130 points]

[(v) Other eligible fire protection activities--125 points]

[(B) Health clinic activities.]

[(i) Construction of a new health clinic building--140 points]

[(ii) Rehabilitation or expansion of an existing health clinic building--135 points]

[(iii) Purchase of equipment related to existing health clinic structures such as heating and cooling equipment--130 points]

[(iv) Other eligible health clinic activities--125 points]

[(C) Facilities providing shelter for persons with special needs (hospitals, nursing homes, convalescent homes).]

[(i) Construction of a new publicly owned and operated facility--140 points]

[(ii) Rehabilitation or expansion of an existing facility--135 points]

[(iii) Purchase of equipment related to the existing facility such as heating and cooling equipment--130 points]

[(iv) Other eligible facility activities--125 points]

[(D) Additional subjective considerations for fire protection, health clinics, and facilities providing shelter for persons with special needs.]

[(i) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]

[(ii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(7) Community centers, senior citizen centers, and social services centers--115 to 135 points.]

[(A) Community center activities.]

[(i) Construction of a new community center building that will provide services and recreation activities--130 points]

[(ii) Construction of a new community center building that will provide only recreation activities--125 points]

[(iii) Rehabilitation or expansion of an existing community center to increase services or the number of people served--123 points]

[(iv) Rehabilitation or expansion of an existing community center without any additional services or increase to the number of people served--121 points]

[(v) Other eligible community center activities--115 points]

[(B) Senior citizen center activities.]

[(i) Construction of a new senior center building that will provide services and recreation activities--130 points]

[(ii) Construction of a new senior center building that will provide only recreation activities--125 points]

[(iii) Rehabilitation or expansion of an existing senior center building to increase services or the number of people served--123 points]

[(iv) Rehabilitation or expansion of an existing senior center building without any additional services or increase to the number of people served--121 points]

[(v) Other eligible senior citizens center activities--115 points]

[(C) Social service center activities.]

[(i) Construction of a new building to provide first-time services to an area--130 points]

[(ii) Rehabilitation or expansion of an existing center building to increase services or the number of people served--125 points]

[(iii) Rehabilitation or expansion of an center building without any additional services or increase to the number of people served--121 points]

[(iv) Other eligible social services center activities--115 points]

[(D) Additional subjective considerations for community centers, senior citizen centers, and social services centers.]

[(i) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]

[(ii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(8) Demolition/clearance and code enforcement activities--115 to 135 points.]

[(A) Demolition/clearance activities.]

[(i) Addressing condemnation activities, eliminating vacant hazardous structures, or eliminating vacant structures used for illegal activities--130 points]

[(ii) Addressing neighborhood beautification activities--125 points]

[(iii) Addressing clearance of vacant lots only--117 points]

[(iv) Other eligible demolition/clearance activities--115 points]

[(B) Code enforcement activities.]

[(i) Addressing condemnation activities, eliminating vacant hazardous structures, or eliminating vacant structures used for illegal activities--130 points]

[(ii) Addressing neighborhood beautification activities--125 points]

[(iii) Addressing clearance of vacant lots only--117 points]

[(iv) Other eligible code enforcement activities--115 points]

[(C) Additional subjective considerations for demolition/clearance and code enforcement activities.]

[(i) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]

[(ii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(9) Gas facilities, electrical facilities and solid waste disposal activities--110 to 130 points.]

[(A) Gas facility activities.]

[(i) Provide first-time gas service to area through a publicly owned and operated utility--125 points]

[(ii) Provide first-time gas service to area through a privately-owned for-profit utility--120 points]

[(iii) Replace existing gas lines for a publicly owned and operated utility to improve service--115 points]

[(iv) Replace existing gas lines for a privately-owned for-profit utility to improve service--112 points]

[(v) Other eligible gas facility activities--110 points]

[(B) Electrical facility activities.]

[(i) Provide first-time electric service to area through a publicly owned and operated utility--125 points]

[(ii) Provide first-time electric service to area through a privately-owned for-profit utility--120 points]

[(iii) Replace existing electric lines for a publicly owned and operated utility to improve service--115 points]

[(iv) Replace existing electric lines for a privately-owned for-profit utility to improve service--112 points]

[(v) Other eligible electric facility activities--110 points]

[(C) Solid waste disposal activities.]

[(i) Activities that include landfill equipment, or transfer station equipment, or site improvements and first-time recycling service--125 points]

[(ii) Construction of a transfer station with necessary eligible equipment and recycling service--122 points]

[(iii) Activities that include landfill equipment, or transfer station equipment, or site improvements--119 points]

[(iv) Acquisition of property for a landfill site or transfer station site and minimal site improvements--115 points]

[(v) Other eligible solid waste disposal activities--110 points]

[(D) Additional subjective considerations for gas facilities, electrical facilities and solid waste disposal activities.]

[(i) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]

[(ii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(10) Access to basic telecommunication activities--105 to 125 points.]

[(A) Provide first-time access to telecommunications and the internet to an area--120 points]

[(B) Additional subjective considerations for access to basic telecommunication activities.]

[(i) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]

[(ii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(11) Jails and detention facility activities--105 to 125 points.]

[(A) Jail facility activities.]

[(i) Construction of a new jail--120 points]

[(ii) Construction of a new police substation in a documented high-crime area--120 points]

[(iii) Rehabilitation of an existing jail or police substation--110 points]

[(iv) Other eligible jail facility activities--105 points]

[(B) Detention facility activities.]

[(i) Construction of a new juvenile detention facility--120 points]

[(ii) Construction of a new adult detention facility--118 points]

[(iii) Rehabilitation of an existing detention facility--110 points]

[(iv) Other eligible detention facility activities--105 points]

[(C) Additional subjective considerations for jails and detention facility activities.]

[(i) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]

[(ii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(12) All other eligible activities--85 to 115 points.]

[(A) Park activities.]

[(i) Construction of a first-time park area or expansion of an existing park to include a recreational activity that is not available at any existing park serving the area--110 points]

[(ii) Improvement to an existing park--100 points]

[(B) Public service activities. Providing public service that has not been provide by the unit of general local government in the preceding 12 months--110 points]

[(C) All other eligible activities. All other eligible activities--85 points]

[(D) Additional subjective considerations for jails and detention facility activities.]

[(i) How the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction--1 to 5 points]

[(ii) Projects that consider the Office's Community Viability Index in establishing the issues to be addressed (a single or multi-jurisdictional application can receive a total of one point)--1 point]

[(13) If the documentation type or terminology differs from what is stated in a particular category but the intent or purpose is the same, the Office may in its discretion use the score for that category rather than assign it to a lower purpose as the document stated in a particular category, the Office may decide to use that category rather than a lower scoring category. The applicant should provide evidence to support such a determination.]

[(14) The total points awarded may not exceed the maximum point range fro any activity category.]

§255.4. Planning/Capacity Building Fund.

(a) (No change.)

(b) Funding cycle. This fund is allocated to eligible units of general local government on a biennial basis for the 2009 and 2010 [2007 and 2008] program years pursuant to a statewide competition held during the 2009 [2007] program year. Applications for funding from the 2009 and 2010 [2007 and 2008] program year allocations must be received by the TxCDBG by the dates and times specified in the most recent application guide for this fund.

(c) Selection procedures. Scoring and the recommended ranking of projects are done by Office staff with input from the regional review committees. The application and selection procedures consist of the following steps.

(1) - (6) (No change.)

(7) The Office staff submits the 2009 [2007] program year and 2010 [2008] program year funding recommendations to the state review committee. In consultation with the executive director and TxCDBG office staff, the state review committee reviews and approves grant applications and associated funding awards of eligible counties and municipalities.

(8) Upon the announcement of the 2009 and 2010 [2007] program year contract awards, the Office staff works with recipients to execute the contract agreements. The award is based on the information provided in the application and on the amount of funding proposed for each contract activity based on the matrix included in the most recent application guide for this fund.

[(9) Upon the announcement of the 2006 program year contract awards, the Office staff works with recipients to execute the contract agreements. The award is based on the information provided in the application and on the amount of funding proposed for each contract activity based on the matrix included in the most recent application guide for this fund.]

(d) Selection criteria. The following is an outline of the selection criteria used by the Office for selection of the projects under the planning/capacity building fund. Four hundred thirty points are available.

(1) (No change.)

(2) Benefit to Low/Moderate Income Persons (total--0 Points). Applicants are required to meet the 51% low/moderate income benefit as a threshold requirement, but no score is awarded on this factor.

(3) Project Design--375 Points (Maximum).

(A) Program Priority (up to 50 points)--Applicant chooses its own priorities here with 10 points awarded per priority as provided in clauses (i) - (iii) of this subparagraph.

(i) Base studies (base mapping, housing, land use, population components) are recommended as one selected priority for applicants lacking updated studies unless they have been previously funded by TxCDBG or have been completed using other resources.

(ii) An applicant requesting TxCDBG funds for fewer than five priorities may receive point credit under this factor for planning studies completed within the last 10 years that do not need to be updated. An applicant requesting TxCDBG funds for a planning study priority that was completed within the past 10 years using TxCDBG funds would not receive scoring credit under this factor.

(iii) Applicants should not request funds to complete a water or sewer study if funds have been awarded within the last two years for these activities or funds are being requested under other TxCDBG fund categories.

(B) Base Match (total--0 Points). The population will be based on available information in the latest national decennial census.

(i) Five percent match required from applicants with population equal to or less than 1,500.

(ii) Ten percent match required from applicants with population over 1,500 but equal to or less than 3,000.

(iii) Fifteen percent match required from applicants with population over 3,000 but equal to or less than 5,000.

(iv) Twenty percent match required from applicants with population over 5,000.

(4) Areawide Proposals (total--50 points). Applicants with jurisdiction-wide proposals because the entire jurisdiction is at least 51 percent low/moderate-income qualify for these points. County applicants with identifiable, unincorporated communities may also qualify for these points provided that incorporation activities are underway. Proof of efforts to incorporate is required. County applicants with identifiable water supply corporations may apply to study water needs only and receive these points.

(5) Planning strategy and products (total 275 points).

(A) Planning Strategy and Products (50, 30 or 20 points possible, if previous plan implementation shown.):

(i) An applicant which has not previously received a planning/capacity building contract or an applicant which has received a planning/capacity building fund contract prior to the 2000 program year and has not received any subsequent planning/capacity building fund contracts--50 points.

(ii) An applicant which has received previous planning/capacity building funding and demonstrates that at least three previous planning recommendations have been implemented, i.e., funds

from any source have been spent to implement recommendations included in the plans--30 points.

(iii) An applicant which has participated in the program established under this section and demonstrates implementation of two of the planning recommendations, regardless of the source of funding, or an applicant which has received previous planning/capacity building funding but demonstrates that conditions have changed to warrant new planning for the same activities--20 points.

(iv) Previous recipients of Planning and Capacity Building Funds since program year 2000 scored under clauses (ii) and (iii) of this subparagraph that have not implemented the previously funded activities, and there are no special or extenuating circumstances prohibiting implementation, will not receive points under the "previous planning" category. Implementation must be completely documented in the original submission of the application and its questionnaire. Further documentation will not be requested.

(B) Proposed Planning Effort (up to 225 points) based on an evaluation of the following:

(i) Community Needs Assessment (Must have both items to get 10 points). Needs identified by priority (7 points); Documentation included of citizen input by three or more non-elected citizens involvement (3 points).

(ii) Good hearings' notices, timeliness (up to 25 points). Hearing notices and publication happened as described in the application guide and all documentation submitted in original application.

(iii) Anticipated Actions (Must have both items):

(I) Applicant has included its anticipated actions to each listed need (10 points);

(II) If only one hearing to determine needs and no other means of needs assessment, is the #1 need in the locality's CD application's Needs Assessment the same as the #1 need in the locality's PCB application's Needs Assessment? If no, subtract 20 points.

(iv) Community is organized as evidenced by a citizens advisory committee, or documents Texas Historical Commission Main Street designation, or previous successful PCB contract closeout since 2000 (with no more than a two-year contract period for PCB performance since PY 2000), thereby indicating for purposes here that it would ensure a planning process or plan implementation (up to 15 points).

(v) Applicant's resolution specifically names activities on Table 2 for which it is applying (up to 5 points).

(vi) According to the application, applicant is applying for planning only; no construction activities proposed for 2009-2010 TxCDBG (up to 23 points).

(vii) Table 1, Description of Planning Activity (up to 5 points, One (1) point apiece)

(I) Originally submitted TABLE 1 requests eligible activities;

(II) Originally submitted TABLE 1 proposes an inventory, analysis and plan;

(III) Originally submitted TABLE 1 addresses identified needs;

(IV) Originally submitted TABLE 1 activities match Table 2 planning elements;

(V) Originally submitted TABLE 1 describes or indicates an implementable strategy.

(viii) Table 2, Benefit to Low/Mod Income Persons (Must have all items, if applicable, to get 5 points):

(I) Amount requested in original submission is less than or equal to matrix prescribed amount;

(II) If special activity funding is requested, the amount was negotiated, as per the matrix;

(III) All proposed activities in original application relate to described needs and resolution.

(ix) Community Base Questionnaire: Original was complete; entire questionnaire included with the original application (up to 3 points). Subtract one (1) point for each blank or non-response where an answer space is provided and an answer is needed to provide a score anywhere on this form up to a maximum of -3.

(x) Staff Capacity: Applicant has demonstrated staff capacity, by having either a Full-time city manager or city administrator; or Full-time planner or documented planner on retainer (up to 2 points).

(xi) Organization for planning: One of the following exists within the applicant's jurisdiction: Planning & Zoning Commission; Planning Commission; Zoning Commission; Zoning Board of Adjustment; Citizens Advisory Committee; or Other local group involved (up to 1 point).

(xii) Applicant has one organization for planning that met seven (7) or more times per calendar year. May require documentation (up to 5 points).

(xiii) Applicant has at least three of the following codes or ordinances passed (or updated) since January 1, 1990, according to the original application: Zoning, Building, Subdivision, Gas Natural, Electrical, Fire, or Plumbing (up to 3 points).

(xiv) Applicant has zoning and no land use and future land use maps (subtract 3).

(xv) Zoning was passed before land use plan was passed. In this instance, the zoning/zoning district map will not be considered as the land use plan (subtract 3).

(xvi) Applicant has at least two of the following codes or ordinances passed or updated since January 1, 1990, according to the original application: Mobile Home, Minimum Standards Housing, Flood Plain, Dangerous Structures, or Fair Housing (up to 3 points).

(xvii) Applicant has at least three (3) the following elements not funded through TxCDBG less than 10 years old (completed since September 30, 1998), according to the application; or, will have in place the following element(s) prior to awards: Land Use, Water System, Housing, Wastewater, Street Plan, Drainage, ED Plan, Solid Waste, CBD Plan, or CIP (2 points maximum; but no points, if reapplying for TxCDBG funding for same elements that were completed within the last ten years using TxCDBG funds).

(xviii) Applicant has both: property tax and sales tax (up to 10 points).

(xix) According to the application, applicant has been successful in collecting an average of 95% or more of its property taxes for the two years of 2006 and 2007 (up to 3 points).

(xx) Applicant reports it has a code enforcement officer (1 point).

(xxi) According to applicant, population change from 2000 to present is (up to 10 points):

(I) Greater than 5% but less than or equal to 10% (2 points);

(II) Greater than 10% but less than or equal to 15% (4 points);

(III) Greater than 15% but less than or equal to 20% (6 points);

(IV) Greater than 20% but less than or equal to 25% (8 points);

(V) Greater than 25% (10 points).

(xxii) Applicant reports it has passed a one-half cent sales tax to fund economic development activities (2 points).

(xxiii) Applicant has performed any two activities to attract or retain business and industry (2 points)

(xxiv) Applicant has applied for federal or state funds (other than TxCDBG) in the last three years (since January 1, 2005) or is currently applying (2 points).

(xxv) Applicant is specifically requesting funding under this application for a Capital Improvement Program or has indicated in the application that a capital improvement programming process is routinely accomplished (1 point).

(xxvi) Applicant reports it has bonded debt as of June 30, 2008 indicating local commitment and an attempt to control problems and implement improvements (4 points).

(xxvii) Applicant reports its per capita bonded debt as less than $500 as of June 30, 2008 generally indicating some additional debt capacity; and, perhaps, indicating the proposed activities will result in the development of a viable and implementable strategy and be an efficient use of grant funds (10 points).

(xxviii) Applicant reports its total debt as less than 10 percent of total market value as of June 30, 2008 (7 points).

(xxix) Applicant reports its annual debt service as less than 20 percent of annual revenues as of June 30, 2008 (6 points).

(xxx) Applicant is in a COG region which had no recipients of TxCDBG Planning and Capacity Building Funds in the previous application cycle--BVCOG, CAPCOG, CTCOG, CVCOG, DETCOG, LRGVDC, PRPC, SETRPC (5 points).

(xxxi) Applicant is requesting fewer than five (5) priority activities and is requesting no more than the dollar amount prescribed in the matrix and no Special Activities requested (6 points).

(xxxii) Applicant is requesting planning funds strictly according to the matrix after competing unsuccessfully last competition or applicant has a population shown on Table 2 of at least 200 but less than or equal to 600 (5 points).

(xxxiii) Commitment, as exhibited by match, based on 2000 Census (up to 5 points). Applicant is contributing the following percentage more than required over the base match amount for its population level:

(I) less than 5% (0 points);

(II) 5% but less than 10% more than required (2 points);

(III) 10% but less than 15% more than required (3 points);

(IV) 15% but less than 20 more than required (4 points); or

(V) At least 20% more than required (5 points);

(xxxiv) Application was received in a complete state; that is, a review letter did not have to request any missing application components, information requested in the application's forms or documentation that must be attached as instructed in the application. Mathematical tabulations and beneficiary data derived from census data must be correct upon receipt. Beneficiary information derived from a survey is an exception. Survey data corrected or changed by ORCA when the applicant is qualifying using only survey data or in combination with census data may be changed in the application without penalty. Applicant will not qualify to compete, if the effect of any change is to drop the low/mod rate below 51 percent (15 points).

(xxxv) Applicant has listed at least three indications of the locality's likelihood to stay directly involved in the planning process and to implement the proposed planning (1 point).

(xxxvi) Special Impact. Whether the list referenced above indicates in the top three reasons that some significant event will occur or has occurred in the region that may impact ability to provide services, such as, a factory locating in the area that will increase jobs, the announced closure of an employer that will reduce jobs; declared natural disaster, or, for example, the announcement of construction of a major interstate highway in the area, etc. (1 point).

(xxxvii) Applicant has no overdue Audit Certifications Forms or Single Audits or audit resolutions as of September 30, 2008 according to Compliance Unit (2 points).

(xxxviii) Applicant has never received a TxCDBG grant and the application indicates the applicant has currently a property tax and a sales tax (10 points).

~~[(2) Project scope (total--100 points).]~~

~~[(A) Program priority (up to 50 points). An applicant chooses its own priorities under this scoring factor. All activities are weighted at ten points apiece. An applicant receives 50 points for its first five priorities. Base studies (base mapping, housing, land use, population components) are recommended for those who lack these updated studies. An applicant is not limited to requesting only its first five priorities. It may also request funds for activities viewed as necessary, but no additional points would be available for these activities. Applicants with fewer than five priorities or wishing to accomplish fewer than five activities receive point consideration for efficient use of grant funds under "Planning Strategy and Products" described in the most recent application guide for this fund.]~~

~~[(B) Areawide proposals (up to 50 points). An applicant must propose to conduct all activities described in its application throughout the entire jurisdiction of the applicant to receive the maximum 50 points. An applicant proposing target area planning receives zero points. County applicants with identifiable, unincorporated communities qualify for these points provided that incorporation or other organization of the unincorporated communities is being considered as an option.]~~

~~[(3) Planning strategy and products (total 275 points).]~~

~~[(A) Previous planning (up to 50 points).]~~

~~*[(i)* An applicant which has not previously received a planning/capacity building contract or an applicant which has received a planning/capacity building fund contract prior to the 1995 program year and has not received any subsequent planning/capacity building fund contracts--up to 50 points.]~~

[(ii) An applicant which has received previous planning/capacity building funding and demonstrates that at least three previous planning recommendations have been implemented, i.e., funds from any source have been spent to implement recommendations included in the plans--up to 40 points.]

[(iii) An applicant which has participated in the program established under this section and demonstrates implementation of some of the planning recommendations, regardless of the source of funding, or an applicant which has received previous planning/capacity building funding but demonstrates that conditions have changed to warrant new planning for the same activities--up to 20 points.]

[(iv) Previous recipients of Planning and Capacity Building Funds since program year 1995 scored under clauses (ii) and (iii) of this subparagraph that have not implemented the previously funded activities, and there are no special or extenuating circumstances prohibiting implementation, will not receive points under the Previous planning category. Implementation must be completely documented in the original submission of the application and its questionnaire. Further documentation will not be requested prior to scoring consideration.]

[(B) Proposed planning effort (225 points). The factors considered by staff of the Office in determining this score are as follows:]

[(i) Community Needs Assessment (up to 10 points) Application must have the following for points:]

[(I) Needs clearly identified by priority; and]

[(II) Evidence of strong citizen input or known citizen involvement;]

[(ii) Evidence of effort to notify special groups included with the originally submitted application (up to 5 points);]

[(iii) Good hearings' notices, timeliness and/or participation. Hearing notices and publication happened as described in the application guide (up to 10 points);]

[(iv) How clearly the proposed planning effort results in a strategy to resolve the identified needs (up to 15 points);]

[(v) Whether the proposed activities will result in development of a viable strategy that can be implemented and would be an efficient use of grant funds (up to 15 points);]

[(vi) Anticipated actions are clear, concise and reasonable (i.e., applicant has responded properly) and anticipated actions match needs (up to 10 points) (Must have both items to receive these points);]

[(vii) Community is organized and would ensure a planning process or plan implementation (as evidenced by advisory committee, main street designation, previous good performance, etc.) (up to 5 points);]

[(viii) Applicant's resolution specifically names activities for which it is applying (up to 5 points);]

[(ix) Applicant is applying for planning only; no construction activities proposed for the 2007 - 2008 TxCDBG (up to 3 points);]

[(x) Table 1, Description of Planning Activity, in application (up to 15 points) (Must have all items to receive points):]

[(I) Originally submitted application describes eligible activities;]

[(II) Originally submitted application describes understanding of plan process;]

[(III) Originally submitted application addresses identified needs;]

[(IV) Originally submitted application appears to result in solution to problems; and]

[(V) Originally submitted application describes or indicates an implementable] strategy;

[(xi) Table 1, Description of Planning Activity, in application: (total 10 points):]

[(I) Original application requests recommended base planning activities (up to 5 points); and]

[(II) Original application documents independent effort in base planning (up to 5 points);]

[(xii) Table 2, Benefit to low/moderate income persons (up to 10 points) (Must have all items, if applicable, for points):]

[(I) Amount requested in original submission is less than or equal to matrix prescribed amount;]

[(II) If special activity funding is requested, the amount appears to be reasonable; and]

[(III) All proposed activities in original application relate to described needs and resolution.]

[(xiii) Community based questionnaire (up to 5 points) (Must have both for points):]

[(I) Original was complete; no pages missing; no more than one to three blanks; no disparities, and]

[(II) Considering the applicant's size, the form indicates an attempt to control problems;]

[(xiv) Staff Capacity--Applicant has demonstrated staff capacity (up to 3 points);]

[(xv) Organization for Planning (to 5 points total)--One of the following exist within the applicant's jurisdiction: Planning and Zoning Commission, Planning Commission, Zoning Commission, Zoning Board of Adjustment, Citizens Advisory Committee, or other local group involved;]

[(xvi) One organization for planning meets six or more times per year (5 points);]

[(xvii) Applicant has at least three of the following codes or ordinances passed since 1983, according to the original application (3 points): Zoning, Building, Subdivision, Gas-Natural, Electrical, Fire, Plumbing;]

[(xviii) Adjustments (Subtract up to 6 points): Applicant has zoning and no land use and future land use maps and requests no base studies (subtract 3 points); and zoning passed before land use plan accomplished and no indication to do land use and/or no zoning requested (subtract 3 points);]

[(xix) Applicant has at least two of the following codes or ordinances passed since 1980, according to the original application Mobile Home, Minimum Standards-Housing, Flood Plain, Dangerous Structures, and Fair Housing (up to 5 points);]

[(xx) Applicant has at least 3 of the following element(s) that are less than 10 years old according to the application or will have in place the following element(s) prior to awards (up to 5 points maximum; but no points if reapplying for TxCDBG funding for same activities accomplished since 1995): Land Use, Water System, Housing, Wastewater, Street Plan, Drainage, Economic Development

Plan, Solid Waste, Central Business District Plan, Capital Improvement Program, or Recreation/Parks;]

[(xxi) Applicant has both a property and sales tax (up to 5 points);]

[(xxii) Applicant has been successful in collecting an average of 95% or more of its property taxes for the two years--2002 and 2003 (per application) (up to 3 points);]

[(xxiii) Applicant reports it has an active code enforcement program (up to 2 points);]

[(xxiv) The population change (up to a total of 10 points). The population change either positive or negative from 1990 to present is between 5% and 10% (up to 2 points); greater than 10% but less or equal to 15% (up to 4 points); greater than 15% but less or equal to 20% (up to 6 points); greater than 20% but less or equal to 25% (up to 8 points); or greater than 25% (up to 10 points);]

[(xxv) Applicant reports it has passed a one-half cent sales tax to fund economic development activities (3 points);]

[(xxvi) Applicant has performed activities to attract or retain business and industry (other than passing the 1/2 cent sales tax) (up to 3 points);]

[(xxvii) Applicant has applied for federal or state funds (other than TxCDBG) in the last three years or is currently applying (up to 3 points);]

[(xxviii) Applicant is specifically requesting funding for a Capital Improvement Program in proper implementation sequence or has indicated in the application that a capital improvement programming process is routinely accomplished (up to 3 points);]

[(xxix) Applicant's responses to questions on the Community Base Questionnaire and/or other portions of the application appear to indicate that the applicant will produce a valid Capital Improvement Program that would draw on local resources and grant/loan programs other than TxCDBG (3 points);]

[(xxx) Applicant is in a Council of Government region which had no recipients of any kind of TxCDBG planning funds during the previous biennial program years (up to 8 points);]

[(xxxi) Applicant is requesting fewer than five priority activities and is requesting no more than the dollar amount prescribed in the matrix and no Special Activities requested or applicant is requesting only Special Activities and it is apparent that they are urgently needed from the application (up to 10 points);]

[(xxxii) Applicant is again requesting planning funds according to the matrix after competing unsuccessfully last competition, according to the Summary Form; or Applicant has a population shown on Table 2 of the application of at least 200 but less than or equal to 500 (up to 5 points);]

[(xxxiii) Commitment, as exhibited by match, based on 2000 Census (up to 5 points). Applicant is contributing the following percentage more than required over the base match amount for its population level:]

[(I) less than 5% (0 points);]

[(II) 5% but less than 10% more than required (2 points);]

[(III) 10% but less than 15% more than required (3 points);]

[(IV) 15% but less than 20 more than required (4 points); or]

[(V) At least 20% more than required (5 points);]

[(xxxiv) Applicant includes at least three sound indications of the locality's likelihood to stay directly involved in the planning process and to implement the proposed planning (up to 3 points);]

[(xxxv) Special Impact. Whether some significant event will occur in the region that may impact ability to provide services, such as a factory locating in the area that will increase jobs by 10 percent, the announced closure of an employer that will reduce jobs by 10 percent, declared natural disaster, or announcement of construction of a major interstate highway in the area (up to 5 points);]

[(xxxvi) Applicant's past performance. Past performance on previous TxCDBG contracts (up to 5 points); and]

[(xxxvii) Applicant has never received a TxCDBG grant and the application would lead one to believe that the project will be completed successfully and the plans implemented (up to 5 points).]

§255.5. Disaster Relief Fund.

(a) General provisions. Assistance under this fund is available to units of general local government for eligible activities under the Housing and Community Development Act of 1974, Title I, as amended, for the alleviation of a disaster situation. To receive assistance under this program category, the situation to be addressed with TxCDBG funds must be both unanticipated and beyond the control of the local government. For example, the collapse of a municipal water distribution system due to lack of regular maintenance does not qualify. If the same situation was caused by a tornado or flood, the community could apply for disaster relief funds. An applicant may not apply for funding to construct public facilities that did not exist prior to the occurrence of the disaster. Starting with the 2004 TxCDBG program year, TxCDBG disaster relief funds will not be provided under the Federal Emergency Management Agency's Hazard Mitigation Grant Program unless the Office receives satisfactory evidence that any property to be purchased was not constructed or purchased by the current owner after the property site location was officially mapped and included in a designated flood plain area. Additionally, in disaster relief situations, the TxCDBG dollars are to be viewed as gap financing or funds of last resort. In other words, the community may only apply to the Office for funding of those activities for which local funds are not available, i.e., the entity has less than six months of unencumbered general operations funds available in its balance as evidenced by the last available audit as required by state statute, or assistance from other sources is not available. TxCDBG will consider whether funds under an existing TxCDBG contract are available to be reallocated to address the situation. TxCDBG may prioritize throughout the program year the use of Disaster Relief assistance funds based on the type of assistance or activity under considerations and may allocate funding throughout the program year based on assistance categories. Assistance under the disaster relief fund is provided only if one of the following has occurred:

(1) The President has issued a federal disaster declaration [The governor has requested a presidential declaration of a major disaster]; or

(2) (No change.)

(b) - (c) (No change.)

[(d) Disaster recovery initiative funds. Disaster recovery initiative funds are available to eligible counties, cities, and Indian tribes to address damages from severe rain storms and flooding. Any damages sustained in the eligible county areas that were sustained from storm or flood conditions that occurred before or after the dates designated in disaster recovery initiative notices for funding are not eligible for assistance. Disaster recovery initiative funds may supplement, but not replace, resources received from other Federal or State agencies

to address the damages from the storm and flood conditions. These funds cannot be used for activities that were reimbursable by or for which funds were made available from the Federal Emergency Management Agency, the Small Business Administration, the National Resource Conservation Service, or the U.S. Army Corps of Engineers.]

[(e) Eligible applicants for disaster recovery initiative funds. Eligible applicants for these funds are nonentitlement and entitlement counties, incorporated cities, or eligible Indian tribes located in one of the counties named in disaster recovery initiative notices for funding that are preceded by Presidential Disaster Declarations for counties in Texas that sustained damages from severe storms and flooding.]

[(f) Eligible disaster recovery initiative activities. Since the eligible activities may vary in each disaster recovery initiative notice for funding, eligible applicants are informed of the eligible activities in each application guide for disaster recovery initiative assistance.]

[(g) Disaster recovery initiative funding cycle. An application for these funds can be submitted on an as-needed basis. An eligible applicant can only submit one application for these funds. Based on the disaster recovery initiative selection criteria, applications selected to receive funding may not necessarily be selected on a first-come, first-served basis.]

[(h) Disaster recovery initiative selection criteria. The following describes the evaluation criteria used by the Office to select disaster recovery initiative grantees.]

[(1) Priority for the use of these funds will be given to applications where all or some of the application activities meet the national program objective of principally benefiting low and moderate income persons. To meet this national program objective at least 51% of the beneficiaries for an application activity must be low and moderate income persons.]

[(2) Priority for these funds will be given to eligible applicants that have not already received a TxCDBG disaster relief grant for activities associated with the occurrence of this disaster.]

[(3) For any application that includes construction or acquisition activities, the Office will consider the applicant's status as a nonparticipating, noncompliant community under the National Flood Insurance Program when prioritizing the selection of the applicants that will receive disaster recovery initiative funds.]

§255.8. Regional Review Committees.

(a) Composition. There is a regional review committee in each of the 24 state planning regions. Each committee consists of at least 12 members appointed by the governor. Composition of each regional committee reflects geographic diversity within the region, difference in population among eligible localities, and types of government (general law cities, home rule cities, and counties). The chairperson of the committee is also appointed by the governor. Members of the committee serve two-year staggered terms. An individual may not serve as a member of a regional review committee while serving as a member of the State Community Development Review Committee.

(b) Role. Under the Community Development Fund each Regional Review Committee is responsible for determining local project priorities and objective factors based on public input. The RRC shall establish the numerical value of the points assigned to each scoring factor and determine the total combined points for all RRC scoring factors. [Each regional review committee reviews and scores all applications submitted from within its region under the community development fund.] Each regional review committee may review and comment on other TxCDBG applications. [Each regional review committee sends its scores and comments to the Office. Regional review committees may elect to utilize staff of regional planning commissions to assist with project review responsibilities except when staff of the regional planning commission intend to prepare TxCDBG applications for the current funding cycle or when staff of the regional planning commission intend to administer TxCDBG projects that could receive TxCDBG funding under the current funding cycle. When staff of the regional planning commissions cannot assist with project review responsibilities, the Office staff may provide the assistance.]

(c) General requirements. In the performance of its responsibilities, each regional review committee shall comply with all federal and state laws and regulations relating to the administration of community development block grant nonentitlement area funds including, but not limited to, requirements of this subchapter, the scoring procedures specified in the current Regional Review Committee Guidebook, and the procedures established by the regional review committee under the TxCDBG.

(1) RRC Must Notify Applicants of Public Hearing to Adopt Local Project Priorities and Objective Scoring Factors.

(A) The RRC proceedings are subject to the Texas Open Meetings Act. The notice of the public hearing and agenda to determine local project priorities and objective scoring criteria must be posted electronically in the Secretary of State's internet site under the Texas Register/Open Meetings, http://www.sos.state.tx.us/texreg/. The notification process requires three days (72-hours) advance notice. The public hearing information must include the date, time and place of the RRC public hearing and the full agenda.

(B) In addition, the RRC must notify each eligible locality in the region in writing of the date, time and place of the RRC public hearing at least five days prior to the public hearing. One of the following four methods must be utilized when sending the notice: certified mail; electronic mail; first class (regular) mail, with a return receipt for local signature enclosed; or deliver in person (e.g., at a Council of Governments (COG) meeting);

(C) A notice of the public hearing must be published in a regional newspaper in the region at least three days in advance of the actual meeting. A published newspaper article is acceptable in lieu of a public notice if it meets the content (date, time, location and purpose) and timing requirements.

(D) The RRC must provide for public comments on the public hearing agenda. RRC discussions, deliberations and votes must be taken in public and must comply with the Texas Open Meetings Act.

(2) Quorum Required for Public Hearing. A public hearing of the RRC requires a quorum of seven members (regardless of status of term or elected office) appointed by the governor. Each Regional Review Committee must establish a policy that prohibits voting by committee members who arrive late or do not attend the entire public hearing held to adopt local project priorities and objective scoring factors and other RRC procedures.

(3) Only Appointed RRC Members May Vote on RRC Actions. An appointed member may designate a local official alternate from his/her city or county to participate in the RRCs deliberations for the purpose of meeting a quorum. This alternate person must be authorized in writing from the official being represented prior to his/her participation at any RRC meeting where voting is to occur. Please note, however, that proxies cannot vote on RRC matters. (This means that proxies may not vote on organizational matters, selection of project priorities, objective scoring factors, and any other related scoring procedures.) Proxies are there to satisfy the quorum requirements.

(4) RRC May Provide Information to ORCA Concerning Threshold Criteria. RRCs are encouraged to provide information that would assist ORCA in determining applicant compliance with eligibil-

ity thresholds and other information that may be considered by ORCA in the state scoring factors.

[(1) Meetings. Each meeting held by a regional review committee shall conform to the following requirements.]

[(A) The regional review committee shall notify each eligible unit of general local government within the regional review committee's state planning region, in writing, of the date, time and location of its organizational meeting at least five days prior to the meeting. The regional review committee shall notify each applicant within its region, in writing, of the date, time and location of its scoring meeting at least five days prior to the meeting. The notices must be in the format specified by the Office in the most recent Regional Review Committee Guidebook. The notices must also be published in a regional newspaper at least three days prior to the meeting. Articles published in such newspapers which satisfy the content and timing requirements of this subparagraph will be accepted by the Office in lieu of publication of notices. The regional review committee must determine at its organizational meeting whether it will have a housing set-aside and include the decision and amount of housing set-aside in the regional review committee scoring guidelines.]

[(B) Each applicant shall be provided with the opportunity to make a presentation to the regional review committee at its scoring meeting.]

[(C) The order of the presentations shall be randomly selected by the regional review committee]

[(D) All discussions, deliberations and votes shall be made in public except for items which would be specifically exempted under the Texas Open Meetings Act. The scoring of applications must occur at the same meeting of the regional review committee at which the presentations by applicants are made.]

[(E) A quorum of a simple majority of the current members of the regional review committee, rounded to the nearest whole number, shall be present. Any actions taken by a regional review committee in which a quorum was not present shall be voidable, provided however, that if a conflict of interest situation has required a regional review committee member to excuse himself, thus dropping the number of participating members below the simple majority requirement, a quorum shall have been considered present.]

[(2) Conflicts of interest. No member of a regional review committee shall vote on an application if the member is on the governing body of the applicant or in cases where that member has a personal or pecuniary interest as defined under state law. A county judge or county commissioner may not score an application from an incorporated city within the county, unless specifically authorized by the regional review committee. A regional review committee member may not discuss any application, including the scoring of any application that the member is allowed to score, with any person that may benefit from an award of TxCDBG funds to such application. If a regional review committee member discusses an application with any person that may benefit from an award of TxCDBG funds to such application, the regional review committee member shall abstain from the scoring of that application.]

[(3) Voting. Only appointed members of a regional review committee may vote on an action of the regional review committee. A regional review committee member may designate an alternate to participate in the member's absence. Each regional review committee shall retain all ballots or other voting records used by its members. Such records shall be maintained in an accessible location and be made available for inspection by the public for a period of one year. Each member of a regional review committee shall score each application individually and shall sign each of his or her ballots and other voting records or scoring sheets. The high and low scores are eliminated and the average of the remaining individual scores is the regional review committee's score on each scoring factor. Consensus scoring is not permitted.]

[(4) Scoring procedures. Each regional review committee (RRC) must submit its scoring procedures to the Office for approval before the procedures are disseminated to all eligible applicants in its region. The committee must establish, as part of the organizational meeting, a scoring methodology for each of the selection factors listed under Local Effort and Merits of the Project consistent with HUD regulations, as determined by TXCDBG. The scoring procedure must prescribe the method of documenting the committee member's score. The RRC may:]

[(A) further subdivide the broad selection factors/categories into smaller categories/increments and provide additional detail in the RRC scoring for the Local Effort and Merits of the Project;]

[(B) select certain "Key questions/Considerations/Factors" that can be used to evaluate the broad selection factor/category and develop a specific number of scoring ranges, including a scoring range for Yes/No answers; or]

[(C) a combination of A and B, which includes a subdivision of the categories into smaller increments and key questions/considerations with specific scoring ranges. Factors selected must be unambiguous in the method of scoring them. As part of the process, the committee must retain documentation showing how each committee member awarded points under this factor and provide a copy of this documentation of the TXCDBG.]

(d) RRC Responsible for Adopting Local Project Priorities and Objective Scoring Factors.

(1) Preliminary Meetings to Obtain Public Input and Provide Input to the RRC for Consideration During the Public Hearing to Discuss, Select, and Adopt Scoring Factors. The RRCs may hold preliminary meetings prior to the public hearing to obtain public input regarding priorities and scoring factors. Preliminary meetings held by the RRC are subject to the Texas Open Meetings Act. The RRC must notify each eligible locality in the region of the date, time and place of the preliminary meeting at least five days in advance of the meeting by first class (regular) mail, electronic mail, or telephone call. If a quorum is not established, the RRC preliminary meetings may be still be held, but no formal action may be taken. Sample scoring criteria may be developed with public participation and submitted to ORCA for preliminary review and for full discussion and deliberation by the RRC during the public hearing.

(2) Hold Public Hearing to Discuss, Select, and Adopt Scoring Factors. During the public hearing to discuss priorities and adopt objective scoring criteria, the public must be given an opportunity to comment on the priorities and the scoring criteria being considered by the RRC. The RRC may limit the duration of public comment period and length of time for comments. The final selection of the scoring factors is the responsibility of each RRC. The RRC may not adopt scoring factors that directly negate or offset ORCA scoring factors.

(3) RRC Indicates How Responses Will Be Scored and Identify Data Sources. The RRC must clearly indicate how responses would be scored under each factor and use data sources that are verifiable to the public. After the RRC's adoption of its scoring factors, the score awarded to a particular application under any RRC scoring factor may not be dependent upon an individual RRC member's judgment

or discretion. (This does not preclude collective RRC action that the state TxCDBG has approved under any appeals process.)

(e) RRC Selects Administrative Support Staff. The RRC shall select one of the following entities to develop the RRC Guidebook, calculate the RRC scores, and provide other administrative RRC support: Regional Council of Governments (COG), TxCDBG staff or TxCDBG designee, or a combination of COG and TxCDBG staff or TxCDBG designee. The RRC Guidebook must identify the entity responsible for calculating the scores and must define the role of each entity selected. The RRC support staff, as determined above, is responsible for reviewing and verifying RRC information found in the application for scoring purposes, but may not accept additional information from applicants. The RRC support staff may only use the application information forwarded by ORCA for scoring purposes.

(f) RRC May Establish Maximum Grant Amounts. RRC may establish maximum grant amounts within the following ranges:

(1) Single Jurisdiction Applications: $250,000 - $800,000

(2) Multi-Jurisdiction Applications: $350,000 - $800,000

(3) Where the RRC takes no action, the grant maximum will be $800,000 for single jurisdiction applications and $800,000 for multi-jurisdiction applications.

(g) RRC Housing and Non-Border Colonia Set-Asides Encouraged. Each Regional Review Committee is highly encouraged to allocate a percentage or amount of its Community Development Fund (CD) allocation to housing projects and for RRCs in eligible areas, non-border colonia projects, for that region. Under a set-aside, the highest ranked applications for a housing or non-border colonia activity, regardless of the position in the overall ranking, would be selected to the extent permitted by the housing or non-border colonia set-aside level. If the region allocates a percentage of its funds to housing and/or non-border colonia activities and applications conforming to the maximum and minimum amounts are not received to use the entire set-asides, the remaining funds may be used for other eligible activities. (Under a housing and/or non-border colonia set-aside process, a community would not be able to receive an award for both a housing or non-border colonia activity and an award for another Community Development Fund activity during the biennial process. Housing projects/activities must conform to eligibility requirements in 42 U.S.C Section 5305 and applicable HUD regulations.) The RRC must include any set-aside in its Regional Review Committee Guidebook.

(h) RRC Guidebook Adopted and Approved At Least 90 Days Prior to Application Deadline. The RRC Guidebook should be adopted by the RRC and approved by TxCDBG staff at least 90 days prior to the CD application deadline set by ORCA. The RRC shall disseminate the RRC Guidebook to the applicants upon written approval by ORCA. The RRC will be required to submit the public input documentation along with the RRC Guidebook to ORCA.

(i) RRC Scores Are Due to ORCA Within 30 Days to Completion of the Deficiency Period. RRC scores are due to ORCA within 30 days after ORCA notifies the region in writing that the deficiency period is complete. The RRC may not change the requested amount of TxCDBG funding, change the scope of the project proposed, or negotiate the specifics of any application. Regional scores may be calculated and reported to ORCA on less than full point intervals (i.e., using decimal points) in order to reduce the chance of ties between regional applicants. ORCA will retain these same intervals when calculating the total scores and final rankings. The RRC shall announce the RRC scores to the public after ORCA has reviewed the scores for accuracy and written approval is received.

(j) COGs Preparing Applications/Administering CD Contracts May Not Be Selected As RRC Support Staff. COGs that prepare CD Fund applications and manage contracts will not be allowed to serve as Regional Review Committee (RRC) support staff for that region during the public hearing and scoring of applications. These COGs may not prepare the RRC Guidebook or score the region's applications.

(k) Impacts of Failure to Adopt RRC Objective Scoring Factors. ORCA will award 2008 funds for a region after its RRC has adopted an objective scoring for PY 2009. If the RRC does not adopt an objective scoring methodology and submit it to the state TxCDBG for approval by the established deadline above, the state TxCDBG staff will establish for the region the scoring factors in Appendix A for the 2009 applications as described above and will award PY 2008 funds for a region after the region's applications have been re-scored using the State scoring method in IV (C)(1)(a-e) of the 2007 Action Plan.

(l) Appeals. Appeals will be handled in accordance with the following procedures:

(1) Written Notification to RRC and ORCA. An applicant must notify its Regional Review Committee and ORCA in writing of the alleged specific violation of the RRC procedures within five working days following the date the RRC scores are made available to the applicants (RRC staff support is advised to record this date).

(2) RRC Notification to Applicants of Appeal(s). Within ten working days following the receipt of an appeal, the RRC will notify all applicants in the region that the RRC will reconvene to hear the appeal. The RRC will give notice to applicants that their scores may be affected by the outcome of the appeal.

(3) RRC Reconvenes to Hear the Appeal(s). In an open meeting, the RRC shall consult with the appellant jurisdiction and consider the appeal. With a simple majority quorum present (i.e., seven members), the RRC will vote to either deny the appeal and forward the appeal and the original regional scores to ORCA or to sustain the appeal and proceed with corrective actions. If the RRC sustains the appeal, the RRC makes corrections and forwards the corrected regional scores to ORCA. The RRC administrative staff will send a written description of the results of the appeals meeting to all applicants in the region and to ORCA. Please note that applicants negatively affected by an original appeal have the same procedural rights to counter-appeal.

(4) Applicants May Appeal a Decision of the RRC. Within five working days following the decision of the RRC, an applicant may submit an appeal of the RRC decision to ORCA. The appeal must be submitted to ORCA in writing stating the alleged specific violation of the RRC procedure.

(5) ORCA Makes Final Scoring and Ranking Determinations. If the appeal is unresolved by the RRC, denied at the regional level, or if an applicant appeals a decision of the RRC, the ORCA executive director will make a final determination as follows: sustain the appeal and make funding recommendations based on corrected regional scores; or reject the appeal and make funding recommendations considering the original RRC scores. ORCA will notify the region of the decision and post the final rankings for the region.

(6) ORCA Forwards Funding Recommendations to the SRC. Following resolution of regional appeals, ORCA staff will make funding recommendations to the State Review Committee for the 2009 and 2010 program years. The SRC consists of 12 elected officials, including a chairman appointed by the Governor. In consultation with the executive director and TxCDBG office staff, the State Review Committee is responsible for reviewing and approving grant

applications and associated funding awards of eligible counties and municipalities.

(7) Applicants May Appeal A Decision of the SRC and File a Complaint with the ORCA Board. An applicant applying under the CD Fund may appeal a decision of the SRC by filing a complaint with the ORCA Board. The ORCA Board shall hold a hearing on a complaint filed with the Board and render a decision. After the ORCA Board renders a final decision, ORCA will notify the region of the determination and post the final rankings for the region.

~~[(d) Appeals. An applicant may appeal the actions of the regional review committee established in its state planning region by following the procedures set forth in this subsection. The Office will withhold the running of computer scores on community development fund applications for five working days after the regional review committee's scoring meeting or until all regional appeals, if any, have been resolved, whichever is longer. A regional review committee must provide written notification of each appeal to all applicants in the region. An applicant that is adversely affected by the action of its regional review committee on an appeal, may appeal that action in accordance with the procedures specified in this subsection.]~~

~~[(1) An applicant shall notify its regional review committee, in writing, of an alleged violation of regional review committee procedures committed by the regional review committee within five working days after the date of the regional review committee meeting which is the subject of the appeal. The applicant shall also send a copy of the appeal to the Office. All appeals must be based on a specifically identified violation of regional review committee procedures.]~~

~~[(2) Within 10 working days after the receipt of an appeal, the regional review committee shall notify all the applicants within its region that the regional review committee will reconvene to hear the appeal. If a quorum of the regional review committee agrees that the alleged procedural violation occurred, the regional review committee shall sustain the appeal, make appropriate adjustments to regional scores, and notify the Office. If a quorum of the regional review committee votes to deny the appeal, the regional review committee shall provide all applicants in the region and the Office with a written statement of the basis of its denial.]~~

~~[(3) If the appeal is resolved, the Office runs the computer scores and provides funding recommendations to the state review committee.]~~

~~[(4) If the appeal is not resolved, the Office prepares an appeal file for the state review committee. The file includes:]~~

~~[(A) the appeal;]~~

~~[(B) the response of the regional review committee;]~~

~~[(C) Office staff reports; and]~~

~~[(D) comments of other interested parties.]~~

~~[(5) The state review committee shall make one of the following recommendations to the executive director of the Office:]~~

~~[(A) sustain the appeal and suggest corrective actions; or]~~

~~[(B) reject the appeal and sustain the regional scores.]~~

§255.9. Colonia Fund.

(a) General provisions. This fund covers the payment of assessments, access fees, and capital recovery fees for low and moderate income persons for eligible water and sewer improvements projects, all other program eligible activities, eligible planning activities projects, and the establishment of colonia self-help centers to serve severely distressed unincorporated areas of counties which meet the definition of a colonia under this fund. A colonia is defined as: any identifiable unincorporated community that is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, and sanitary housing; and was in existence as a colonia prior to the Cranston-Gonzalez National Affordable Housing Act (November 28, 1990). For an eligible county to submit an application on behalf of eligible colonia areas, the colonia areas must be within 150 miles of the Texas-Mexico border region, except that any county that is part of a standard metropolitan statistical area with a population exceeding one million is not eligible under this fund.

(1) - (2) (No change.)

(3) Eligibility for the Office's colonia economically distressed areas program EDAP fund (colonia EDAP fund) is limited to counties, and nonentitlement cities (that meet other eligibility requirements including the geographic requirements of the Colonia Fund), located in those counties, that are eligible under the TxCDBG Colonia Fund and Texas Water Development Board's EDAP. Eligible colonia EDAP fund projects shall be located in unincorporated colonias and in eligible nonentitlement cities that annexed the eligible colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. A colonia EDAP fund application cannot be submitted until the construction of the Texas Water Development Board's Economically Distressed Areas Program financed water or sewer system begins.

(4) (No change.)

(b) (No change.)

(c) Types of applications. [~~Eligible applicants may submit one application for the colonia construction fund and the colonia planning fund. Eligible applicants may submit one application for the colonia EDAP fund, unless the TxCDBG has an excess amount of colonia EDAP funds available in which case an eligible applicant could submit more than one application for the colonia EDAP fund. Eligible planning activities cannot be included in an application for the colonia construction fund. Two separate fund categories are available under the colonia planning fund. The colonia area planning fund is available for eligible planning activities that are targeted to selected colonia areas. The colonia comprehensive planning fund is available for countywide comprehensive planning activities that include an assessment and profiles of a county's colonia areas. Separate competitions are held for the colonia area planning fund and colonia comprehensive planning fund allocations. A county that has previously received a colonia comprehensive planning fund grant award from the Office may not submit another application for colonia comprehensive planning fund assistance. For a county to be eligible to submit an application for the colonia area planning fund, the county must have previously completed a colonia comprehensive plan that prioritizes problems and colonias for future action. The colonia or colonias included in the colonia area planning fund application must be colonias that were included in the colonia comprehensive plan.~~]

(1) Colonia Planning and Construction Fund.

(A) Colonia Construction Component. The allocation is available on a biennial basis for funding from program years 2009 and 2010 through a 2009 annual competition. Applications received by the 2009 program year application deadline are eligible to receive grant awards from the 2009 and 2010 program year allocations. Funding priority shall be given to TxCDBG applications from localities that have been funded through the Texas Water Development Board Economically Distressed Areas Program (TWDB EDAP) where the Tx-

CDBG project will provide assistance to colonia residents that cannot afford the cost of service lines, service connections, and plumbing improvements associated with access to the TWDB EDAP-funded water or sewer system. An eligible county applicant may submit one (1) application for the following eligible construction activities:

(i) Assessments for Public Improvements--The payment of assessments (including any charge made as a condition of obtaining access) levied against properties owned and occupied by persons of low- and moderate-income to recover the capital cost for a public improvement.

(ii) Other Improvements--Other activities eligible under 42 U.S.C. Section 5305 designed to meet the needs of colonia residents.

(B) Colonia Planning Component. A portion of the funds will be allocated to two separate biennial competitions for applications that include planning activities targeted to selected colonia areas (Colonia Area Planning activities), and for applications that include countywide comprehensive planning activities (Colonia Comprehensive Planning activities). Applications received by the 2009 program year application deadline are eligible to receive a grant award from the 2009 and 2010 program year allocations. A Colonia Planning activities application must receive a minimum score for the Project Design selection factor of at least 70 percent of the maximum number of points allowable under this factor to be considered for funding.

(i) Colonia Area Planning Activities. In order to qualify for the Colonia Area Planning activities, the county applicant must have a Colonia Comprehensive Plan in place that prioritizes problems and colonias for future action. The targeted colonia must be included in the Colonia Comprehensive Plan. An eligible county may submit an application for eligible planning activities that are targeted to one or more colonia areas. Eligible activities include:

(I) Payment of the cost of planning community development (including water and sewage facilities) and housing activities;

(II) costs for the provision of information and technical assistance to residents of the area in which the activities are located and to appropriate nonprofit organizations and public agencies acting on behalf of the residents; and

(III) costs for preliminary surveys and analyses of market needs, preliminary site engineering and architectural services, site options, applications, mortgage commitments, legal services, and obtaining construction loans.

(ii) Colonia Comprehensive Planning Activities. To be eligible for these funds, a county must be located within 150 miles of the Texas-Mexico border. The applicant's countywide comprehensive plan will provide a general assessment of the colonias in the county, but will include enough detail for accurate profiles of the county's colonia areas. The prepared comprehensive plan must include the following information and general planning elements:

(I) Verification of the number of dwellings, number of lots, number of occupied lots, and the number of persons residing in each county colonia;

(II) Mapping of the locations of each county colonia;

(III) Demographic and economic information on colonia residents;

(IV) The physical environment in each colonia including land use and conditions, soil types, and flood prone areas;

(V) An inventory of the existing infrastructure (water, sewer, streets, drainage) in each colonia and the infrastructure needs in each colonia including projected infrastructure costs;

(VI) The condition of the existing housing stock in each colonia and projected housing costs;

(VII) A ranking system for colonias that will enable counties to prioritize colonia improvements rationally and systematically plan and implement short-range and long-range strategies to address colonia needs;

(VIII) Goals and Objectives;

(IX) Five-year capital improvement program.

(2) Colonia Economically Distressed Areas Program (CEDAP) Legislative Set-aside. The allocation is distributed on an as-needed basis. Eligible applicants may submit an application that will provide assistance to colonia residents that cannot afford the cost of service lines, service connections, and plumbing improvements associated with being connected to a TWDB EDAP-funded water and sewer system improvement project. An application cannot be submitted until the construction of the TWDB EDAP-funded water or sewer system begins. Eligible program costs include water distribution lines and sewer collection lines providing connection to water and sewer lines installed through the Texas Water Development Board's Economically Distressed Areas Program (when approved by the TxCDBG), taps and meters (when approved by the TxCDBG), yard service lines, service connections, plumbing improvements, and connection fees, and other eligible approved costs associated with connecting an income-eligible family's housing unit to the TWDB improvements. An applicant may not have an existing CEDAP contract open in excess of 48 months and still be eligible for a new CEDAP award.

(3) Colonia Self-Help Centers Legislative Set-aside. The colonia self-help centers fund is allocated on an annual basis to counties included in Chapter 2306, Subchapter Z, §2306.582, Texas Government Code, and/or counties designated as economically distressed areas under Chapter 17, Texas Water Code. TDHCA has established self-help centers in Cameron County, El Paso County, Hidalgo County, Starr County, and Webb County. If deemed necessary and appropriate, TDHCA may establish self-help centers in other counties (self-help centers have been established in Maverick County and Val Verde County) as long as the site is located in a county that is designated as an economically distressed area under the Texas Water Development Board Economically Distressed Areas Program, the county is eligible to receive EDAP funds, and the colonias served by the center are located within 150 miles of the Texas-Mexico border.

~~[(d) Funding cycle. The colonia construction fund is allocated to eligible county applicants on a biennial basis for the 2007 and 2008 program years pursuant to a competition held for the 2007 program year applicants. The colonia planning fund is allocated on an annual basis to eligible county applicants through competitions conducted during the program year. Applications for funding must be received by the Office by the dates and times specified in the most recent application guide for each separate colonia fund category. The colonia self-help centers fund is allocated on an annual basis to counties included in Subchapter Z, Chapter 2306, §2306.582, Texas Government Code, and/or counties designated as economically distressed areas under Chapter 17, Texas Water Code. The colonia EDAP fund is allocated on an annual basis and the funds are distributed on an as-needed basis.]~~

(d) [~~(e)~~] Selection procedures.

(1) On or before the application deadline, each eligible county may submit one application for the colonia construction component, colonia area planning activities, and colonia comprehensive planning activities [~~colonia construction fund, for colonia comprehensive planning, and for colonia area planning~~]. Eligible applicants for the colonia EDAP fund may submit one application after construction begins on the water or sewer system financed by the Texas Water Development Board's Economically Distressed Areas Program.

(2) Upon receipt of an application, the Office staff performs an initial review to determine whether the application is complete and whether all proposed activities are eligible for funding. The results of this initial review are provided to the applicant. If not subject to disqualification, the applicant may correct any deficiencies identified within ten calendar days of the date of the staff's notification.

(3) Each regional review committee may, at its option, review and comment on a colonia fund proposal from a jurisdiction within its state planning region. These comments will become part of the application file, provided such comments are received by the Office prior to scoring of the applications.

(4) The Office then scores the colonia construction component, colonia area planning activities, and colonia comprehensive planning activities [~~colonia construction fund and colonia planning fund~~] applications to determine rankings. Scores on the selection factors are derived from standardized data from the Census Bureau, other federal or state sources, and from information provided by the applicant. For colonia EDAP fund applications, the Office evaluates information in each application and other factors before the completion of a final technical review of each application.

(5) Following a final technical review, the Office staff presents the funding recommendations for the 2009 and 2010 [~~2007 and 2008~~] colonia [~~construction~~] fund and colonia EDAP fund [~~and the 2007 colonia planning fund~~] to the executive director of the Office. In consultation with the executive director and TxCDBG staff, the state review committee reviews and approves grant applications and associated funding awards of eligible counties and municipalities.

(6) Upon announcement of the 2009 and 2010 [~~2007~~] contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded.

(e) [~~(f)~~] Selection criteria (colonia [~~construction~~] fund). The following is an outline of the selection criteria used by the Office for scoring colonia [~~construction~~] fund applications (colonia construction component, colonia area planning activities, and colonia comprehensive planning activities). [~~For the 2007 and 2008 program years, four hundred thirty points are available.~~]

(1) Colonia construction component (430 total points maximum).

(A) [~~(1)~~] Community distress (total--35 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(i) [~~(A)~~] Percentage of persons living in poverty--15 points

(ii) [~~(B)~~] Per capita income--10 points

(iii) [~~(C)~~] Percentage of housing units without complete plumbing--5 points

(iv) [~~(D)~~] Unemployment rate--5 points

(B) [~~(2)~~] Benefit to low and moderate income persons (total--30 points). A formula is used to determine the percentage of TxCDBG funds benefiting low to moderate income persons. The percentage of low to moderate income persons benefiting from each construction, acquisition, and engineering activity is multiplied by the TxCDBG funds requested for each corresponding construction, acquisition, and engineering activity. Those calculations determine the amount of TxCDBG benefiting low to moderate income person for each of those activities. Then, the funds benefiting low to moderate income persons for each of those activities are added together and divided by the TxCDBG funds requested minus the TxCDBG funds requested for administration to determine the percentage of TxCDBG funds benefiting low to moderate income persons. Points are then awarded in accordance with the following scale:

(i) [~~(A)~~] 100% to 90% of funds benefiting low to moderate income persons--30 points

(ii) [~~(B)~~] 89.99% to 80% of funds benefiting low to moderate income persons--25 points

(iii) [~~(C)~~] 79.99% to 70% of funds benefiting low to moderate income persons--20 points

(iv) [~~(D)~~] 69.99% to 60% of funds benefiting low to moderate income persons--15 points

(v) [~~(E)~~] Below 60% of funds benefiting low to moderate income persons--5 points

(C) [~~(3)~~] Project priorities (total--195 points). When necessary, a weighted average is used to assign scores to applications which include activities in the different project priority scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity is calculated. The percentage of the total TxCDBG construction dollars for each activity is then multiplied by the appropriate project priorities point level. The sum of the calculations determines the composite project priorities score. The different project priority scoring levels are:

(i) [~~(A)~~] activities (service lines, service connections, and/or plumbing improvements) providing access to water and/or sewer systems funded through the Texas Water Development Board Economically Distressed Area program--195 points

(ii) [~~(B)~~] first time public water service activities (including yard service lines)--145 points

(iii) [~~(C)~~] first time public sewer service activities (including yard service lines)--145 points

(iv) [~~(D)~~] installation of approved residential on-site wastewater disposal systems for providing first time service--145 points

(v) [~~(E)~~] installation of approved residential on-site wastewater disposal systems for failing systems that cause health issues--140 points

(vi) [~~(F)~~] housing activities--140 points

(vii) [~~(G)~~] first time water and/or sewer service through a privately-owned for profit utility--135 points

(viii) [~~(H)~~] expansion or improvement of existing water and/or sewer service--120 points

(ix) [~~(I)~~] street paving and drainage activities--75 points

(x) [~~(J)~~] all other eligible activities--20 points

(D) [~~(4)~~] Matching funds (total--20 points). An applicant's matching share may consist of one or more of the following contributions: cash; in-kind services or equipment use; materials or supplies; or land. An applicant's match is considered only if the contributions are used in the same target areas for activities directly related to the activities proposed in its application; if the applicant demonstrates that its matching share has been specifically designated for use in the activities proposed in its application; and if the applicant has used an acceptable and reasonable method of valuation. The population category under which county applications are scored is dependent upon the project type and the beneficiary population served. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the unincorporated residents for the entire county. For county applications addressing water and sewer improvements in unincorporated areas, the population category is based on the actual number of beneficiaries to be served by the project activities. The population category under which multi-jurisdiction applications are scored is based on the combined populations of the applicants according to the 2000 Census. Applications that include a housing rehabilitation and/or affordable new permanent housing activity for low- and moderate-income persons as a part of a multi-activity application do not have to provide any matching funds for the housing activity. This exception is for housing activities only. The TxCDBG does not consider sewer or water service lines and connections as housing activities. The TxCDBG also does not consider on-site wastewater disposal systems as housing activities. Demolition/clearance and code enforcement, when done in the same target area in conjunction with a housing rehabilitation activity, is counted as part of the housing activity. When demolition/clearance and code enforcement are proposed activities, but are not part of a housing rehabilitation activity, then the demolition/clearance and code enforcement are not considered as housing activities. Any additional activities, other than related housing activities, are scored based on the percentage of match provided for the additional activities.

(i) [~~(A)~~] Applicants with populations equal to or less than 1,500 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 5.0% of grant request--20 points;

(II) [~~(ii)~~] match at least 2.0% but less than 5.0% of grant request--10 points;

(III) [~~(iii)~~] match less than 2.0% of grant request--0 points.

(ii) [~~(B)~~] Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 10% of grant request--20 points;

(II) [~~(ii)~~] match at least 2.5% but less than 10% of grant request--10 points;

(III) [~~(iii)~~] match less than 2.5% of grant request--0 points.

(iii) [~~(C)~~] Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 15% of grant request--20 points;

(II) [~~(ii)~~] match at least 3.5% but less than 15% of grant request--10 points;

(III) [~~(iii)~~] match less than 3.5% of grant request--0 points.

(iv) [~~(D)~~] Applicants with populations over 5,000 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 20% of grant request--20 points;

(II) [~~(ii)~~] match at least 5.0% but less than 20% of grant request--10 points;

(III) [~~(iii)~~] match less than 5.0% of grant request--0 points.

(E) [~~(5)~~] Project design (total--140 points). Each application is scored based on how the proposed project resolves the identified need and the severity of need within the applying jurisdiction. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund and in subparagraph (F) of this paragraph [~~paragraph (6) of this subsection~~]. Each application is scored by a committee composed of TxCDBG staff using the following information submitted in the application:

(i) [~~(A)~~] the severity of need within the colonia area(s) and how the proposed project resolves the identified need (additional consideration is given to water activities addressing impacts from drought conditions);

(ii) [~~(B)~~] the TxCDBG cost per low to moderate income beneficiary;

(iii) [~~(C)~~] the applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TxCDBG community development fund or through community development block grant entitlement funds;

(iv) [~~(D)~~] the projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage;

(v) [~~(E)~~] the ability of the applicant to utilize the grant funds in a timely manner;

(vi) [~~(F)~~] the availability of grant funds to the applicant for project financing from other sources;

(vii) [~~(G)~~] whether the applicant, or the service provider, has waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries;

(viii) [~~(H)~~] whether the applicant's proposed use of TxCDBG funds is to provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed through the Texas Water Development Board Economically Distressed Areas Program;

(ix) [~~(I)~~] whether the applicant has already met its basic water and wastewater needs if the application is for activities other than water or wastewater;

(x) [~~(J)~~] whether the project has provided for future funding necessary to sustain the project;

(xi) [~~(K)~~] whether the applicant has provided any local matching funds for administrative, engineering, or construction activities;

(xii) [~~(L)~~] the applicant's past performance on previously awarded TxCDBG contracts; and

(xiii) [~~(M)~~] proximity of project site to entitlement cities or metropolitan statistical areas.

(F) [~~(6)~~] Project design scoring guidelines. Project design scores are assigned by Office staff using guidelines that first consider the severity of the need for each application activity and how the project resolves the need described in the application. The severity of need and resolution of the need determine the maximum project design score that can be assigned to an application. After the maximum project design score has been established, points are then deducted from this maximum score through the evaluation of the other project design evaluation factors until the maximum score and the point deductions from that maximum score determine the final assigned project design score. When necessary, a weighted average is used to set the maximum project design score to applications that include activities in the different severity of the need/project resolution maximum scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity is calculated. The percentage of the total TxCDBG construction dollars for each activity is then multiplied by the appropriate maximum project design point level. The sum of the calculations determines the maximum project design score that the applicant can be assigned before points are deducted based on the evaluation of the other project design factors.

(i) [~~(A)~~] Maximum project design score that can be assigned based on the severity of the need and resolution of the problem.

(I) [~~(i)~~] Activities providing first-time public sewer service to the area--maximum score 140 points.

(II) [~~(ii)~~] Activities providing first-time public water service to the area--maximum score 140 points.

(III) [~~(iii)~~] Installation of approved residential on-site wastewater disposal systems providing first-time sewer service--maximum score 140 points.

(IV) [~~(iv)~~] Installation of approved residential on-site wastewater disposal systems for failing systems that cause health issues--maximum score 130 points.

(V) [~~(v)~~] Housing rehabilitation and eligible new housing construction--maximum score 130 points.

(VI) [~~(vi)~~] Water activities addressing and resolving water supply shortage from drought conditions--maximum score 130 points.

(VII) [~~(vii)~~] Water or sewer activities expanding or improving existing water or sewer system--maximum score 125 points.

(VIII) [~~(viii)~~] Street paving activities providing first time surface pavement to the area--maximum score 100 points.

(IX) [~~(ix)~~] Installation of designed drainage structures providing first time designed drainage system to the area--maximum score 100 points.

(X) [~~(x)~~] Reconstruction of streets with existing surface pavement--maximum score 90 points.

(XI) [~~(xi)~~] Installation of improvements or drainage structures to a designed drainage system--maximum score 90 points.

(XII) [~~(xii)~~] All other eligible activities--maximum score 80 points.

(ii) [~~(B)~~] TxCDBG cost per low to moderate income beneficiary. The total amount of TxCDBG funds requested by the applicant is divided by the total number of low to moderate income persons benefiting from the application activities to determine the TxCDBG cost per beneficiary.

(I) [~~(i)~~] Cost per low to moderate income beneficiary is equal to or less than $2,000. Deduct zero points from the set maximum project design score.

(II) [~~(ii)~~] Cost per low to moderate income beneficiary is greater than $2,000 but equal to or less than $4,000. Deduct 1 point from the set maximum project design score.

(III) [~~(iii)~~] Cost per low to moderate income beneficiary is greater than $4,000 but equal to or less than $6,000. Deduct 2 points from the set maximum project design score.

(IV) [~~(iv)~~] Cost per low to moderate income beneficiary is greater than $6,000 but equal to or less than $8,000. Deduct 3 points from the set maximum project design score.

(V) [~~(v)~~] Cost per low to moderate income beneficiary is greater than $8,000 but equal to or less than $10,000. Deduct 4 points from the set maximum project design score.

(VI) [~~(vi)~~] Cost per low to moderate income beneficiary is greater than $10,000 but equal to or less than $11,000. Deduct 5 points from the set maximum project design score.

(VII) [~~(vii)~~] Cost per low to moderate income beneficiary is greater than $11,000 but equal to or less than $13,000. Deduct 10 points from the set maximum project design score.

(VIII) [~~(viii)~~] Cost per low to moderate income beneficiary is greater than $13,000 but equal to or less than $15,000. Deduct 15 points from the set maximum project design score.

(IX) [~~(ix)~~] Cost per low to moderate income beneficiary is greater than $15,000 but equal to or less than $17,000. Deduct 20 points from the set maximum project design score.

(X) [~~(x)~~] Cost per low to moderate income beneficiary is greater than $17,000 but equal to or less than $19,000. Deduct 30 points from the set maximum project design score.

(XI) [~~(xi)~~] Cost per low to moderate income beneficiary is greater than $19,000. Deduct 40 points from the set maximum project design score.

(iii) [~~(C)~~] The applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TxCDBG community development fund or through community development block grant entitlement funds.

(I) [~~(i)~~] The nonentitlement county submitted an application under the TxCDBG community development fund 2005/2006 biennial competition that was not addressing water, sewer,

and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(II) [~~(ii)~~] The nonentitlement county submitted an application under the TxCDBG community development fund 2003/2004 biennial competition that was not addressing water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(III) [~~(iii)~~] The entitlement county did not use 2005 CDBG entitlement funds to address water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(IV) [~~(iv)~~] The entitlement county did not use 2004 CDBG entitlement funds to address water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(iv) [~~(D)~~] The projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage.

(I) [~~(i)~~] The projected water and/or sewer rates may be too high for the application beneficiaries. Deduct 1 point from the set maximum project design score.

(II) [~~(ii)~~] The projected water and/or sewer rates are too low to discourage water conservation by the application beneficiaries. Deduct 1 point from the set maximum project design score.

(v) [~~(E)~~] The ability of the applicant to utilize the grant funds in a timely manner.

(I) [~~(i)~~] The application includes the acquisition of real property, easements or rights-of-way. Deduct 1 point from the set maximum project design score.

(II) [~~(ii)~~] The application includes matching funds that have not been secured by the applicant. Deduct 1 point from the set maximum project design score.

(III) [~~(iii)~~] The proposed application target area is not located in an area where a service provider already has the certificate of convenience and necessity (CCN) needed to provide service to the application beneficiaries. Deduct 1 point from the set maximum project design score.

(vi) [~~(F)~~] The availability of grant funds to the applicant for project financing from other sources. Grant funds for any activity included in the application are available from another source. Deduct 1 point from the set maximum project design score.

(vii) [~~(G)~~] The applicant, or the service provider, has not waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries.

(I) [~~(i)~~] Assessments and fees budgeted in the application are equal to or less that $100 per low and moderate income household. Deduct 2 points from the set maximum project design score.

(II) [~~(ii)~~] Assessments and fees budgeted in the application are greater than $100 but equal to or less that $200 per low and moderate income household. Deduct 4 points from the set maximum project design score.

(III) [~~(iii)~~] Assessments and fees budgeted in the application are greater than $200 but equal to or less that $300 per low and moderate income household. Deduct 6 points from the set maximum project design score.

(IV) [~~(iv)~~] Assessments and fees budgeted in the application are greater than $300 but equal to or less that $500 per low and moderate income household. Deduct 8 points from the set maximum project design score.

(V) [~~(v)~~] Assessments and fees budgeted in the application are greater than $500 per low and moderate income household. Deduct 10 points from the set maximum project design score.

(viii) [~~(H)~~] Applicant's proposed use of TxCDBG funds does not provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed through the Texas Water Development Board Economically Distressed Areas Program. Deduct 2 points from the set maximum project design score.

(ix) [~~(I)~~] The application is for activities other than water or wastewater and the applicant has not already met its basic water and wastewater needs. Deduct 3 points from the set maximum project design score.

(x) [~~(J)~~] The applicant has not documented that future funding necessary to sustain the project is available. Deduct 3 points from the set maximum project design score.

(G) [~~(7)~~] Past performance. An applicant receives from zero to ten points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will primarily be based on an assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. TxCDBG staff may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. An applicant that has never received a TxCDBG grant award will automatically receive these points. TxCDBG staff will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance on TxCDBG contracts after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance may include, but is not necessarily limited to the following:

(i) [~~(A)~~] The applicant's completion of the previous contract activities within the original contract period.

(ii) [~~(B)~~] The applicant's submission of the required close-out documents within the period prescribed for such submission.

(iii) [~~(C)~~] The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs.

(iv) [~~(D)~~] The applicant's timely response to audit findings on previous TxCDBG contracts.

(v) [~~(E)~~] The applicant's submission of all contract reporting requirements such as quarterly progress reports, certificates of expenditures, and project completion reports.

(H) Colonia Construction Component Marginal Applicant. The marginal applicant is the applicant whose score is high enough for partial funding of the applicant's original grant request. If the marginal amount available to this applicant is equal to or more than the Colonia Construction Component grant minimum of $75,000, the marginal applicant may scale down the scope of the original project design, and accept the marginal amount, if the reduced project is still feasible. In the event that the marginal amount remaining in the Colonia Construction Component allocation is less than $75,000, then the remaining funds will be used to either fund a Colonia Planning Fund application or will be reallocated to other established TxCDBG fund categories.

(2) [~~(g)~~] Colonia area planning component (340 Total Points Maximum) [~~Selection criteria (colonia area planning fund)~~]. The following is an outline of the selection criteria used by the Office for scoring applications for eligible planning activities under this fund. Three hundred forty points are available.

(A) [~~(1)~~] Community distress (total--up to 35 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(i) [~~(A)~~] Percentage of persons living in poverty--15 points

(ii) [~~(B)~~] Per capita income--10 points

(iii) [~~(C)~~] Percentage of housing units without complete plumbing--5 points

(iv) [~~(D)~~] Unemployment Rate--5 points

(B) [~~(2)~~] Benefit to low and moderate income persons (total--30 points). Points are awarded based on the low and moderate income percentage for all of the colonia areas where project activities are located according to the following scale:

(i) [~~(A)~~] 100% to 90% of funds benefiting low to moderate income persons--30 points

(ii) [~~(B)~~] 89.99% to 80% of funds benefiting low to moderate income persons--25 points

(iii) [~~(C)~~] 79.99% to 70% of funds benefiting low to moderate income persons--20 points

(iv) [~~(D)~~] 69.99% to 60% of funds benefiting low to moderate income persons--15 points

(v) [~~(E)~~] Below 60% of funds benefiting low to moderate income persons--5 points

(C) [~~(3)~~] Project design (total--255 points). Each application is scored based on how the proposed planning effort resolves the identified need and the severity of need within the applying jurisdiction. A colonia planning fund application must receive a minimum score for the project design selection factor of at least 70 percent of the maximum number of points available under this factor to be considered for funding. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund. Each application is scored by TxCDBG staff using the following information submitted in the application:

[~~(A) the severity of need within the colonia area(s) (total--up to 60 points);~~]

(i) Evidence of severity of need as described in originally received application (total--up to 10 points).

(ii) Applicant provides documentation that proposed colonia(s) is/are ranked high that is, within the top five colonias in its "comprehensive plan" as submitted to the TxCDBG (up to 30 points) [~~Primary need within all target area colonia(s) generally as reported in originally received application (total--up to 20 points):~~]

(iii) [~~(I)~~] all target area colonia(s) not platted (up to 20 points)

(iv) [~~(II)~~] all target area colonia(s) with no water (up to 20 points)

(v) [~~(III)~~] all target area colonia(s) with no wastewater (up to 20 points)

(vi) [~~(IV)~~] all or some target area colonia(s) are partially platted or platted but not recorded (up to 10 points)

(vii) [~~(V)~~] target area colonia(s) partial water (up to 10 points)

(viii) [~~(VI)~~] target area colonia(s) partial sewer (up to 10 points)

(ix) [~~(iii)~~] Population (total--10 points). The change in county population from 1990 and current HUD estimate [~~2000~~] is between:

(I) greater than 5% but less than or equal to 10% (2 points)

(II) greater than 10% but less than or equal to 15% (4 points)

(III) greater than 15% but less than or equal to 20% (6 points)

(IV) greater than 20% but less than or equal to 25% (8 points)

(V) greater than 25% (10 points)

(x) [~~(iv)~~] Needs are clearly identified in original application by priority through a community needs assessment (total--up to 5 points).

(xi) [~~(v)~~] Evidence provided in the original application of [~~strong~~] citizen input or known citizen involvement in addressing need (total--up to 15 [~~5~~] points).

~~*[(vi)* Evidence provided in the original application of effort to notify special groups to solicit information on severity of need (total--up to 5 points).]~~

(xii) [~~(vii)~~] Evidence provided in the original application that the public hearings to solicit input on needs were performed as described in the application guide (total--up to 28 [~~5~~] points).

~~[(B) how clearly the proposed planning effort removes barriers to the provision of public facilities to the colonia area(s) and results in a strategy to resolve the identified needs (total--up to 60 points);]~~

(xiii) [~~(i)~~] Proposed planning efforts as described in the application are clear, concise and reasonable (total--up to 20[~~15~~] points).

~~*[(ii)* Proposed target area is clearly defined in the application (total--up to 15 points).]~~

~~*[(iii)* Proposed planning efforts as described in the application match the needs in the target area (total--up to 15 points).]~~

~~*[(iv)* Evidence in the application that the county is organized to implement the plan or would ensure that the plan is implemented (total--up to 15 points).]~~

[~~(C) the planning activities proposed in the application (total--up to 65 points);~~]

(xiv) [~~(i)~~] The description of planning activity in the original application:

(I) Originally submitted TABLE 1 requests eligible activities (3 points);

(II) Originally submitted TABLE 1 proposes an inventory, analysis and plan or an eligible activity not previously funded through the Colonia Fund (3 points);

(III) Originally submitted TABLE 1 addresses identified needs (3 points);

(IV) Originally submitted TABLE 1 activities match Table 2 planning elements (3 points);

(V) Originally submitted TABLE 1 describes or indicates an implementable strategy, for example, a capital improvements plan or other method (3 points).

~~*(I)* Describes eligible activities (total--up to 7 points).~~]

~~*(II)* Describes understanding of plan process (total--up to 7 points).~~]

~~*(III)* Addresses identified needs (total--up to 7 points).~~]

~~*(IV)* Appears to result in solution to problems (total--up to 7 points).~~]

~~*(V)* Indicates a strategy that can be implemented (total--7 points).~~]

(xv) All proposed activities will be conducted on a colonia-wide basis (10 points).

(xvi) The extent to which any previous planning efforts for colonia areas have been accomplished. Applicant was a previous recipient of Colonia Planning Funds and through implementation of previously funded activities a colonia has been eliminated from colonia status (water, wastewater and housing needs have been provided for). Evidence such as a resolution of the commissioner's court that county has eliminated a colonia from the original colonia list in the comprehensive study or the OAG list thus indicating that the county is organized to implement the plan or would ensure that the plan is implemented. Points will be awarded if applicant is a previous recipient of a Colonia Comprehensive Planning Fund award and certifies completion of all of a colonia's needs since the colonia's problems were last studied (25 points).

~~*(ii)* Considering the applicant's probable capability, the Colonia Questionnaire in the original application indicates an attempt to control problems and the original submission was complete (total--up to 10 points).~~]

~~*(iii)* Applicant has indicated in the application that a capital improvement programming process is routinely accomplished or will be developed as part of the planning project (total--up to 10 points).~~]

~~*(iv)* Applicant's responses to questions in the originally submitted application appear to indicate that the applicant will produce a valid Capital Improvements Program that would draw on local resources and other grant/loan programs (total--up to 10 points).~~]

~~(D) whether each proposed planning activity is conducted on a colonia-wide basis (total--up to 10 points). All proposed activities will be conducted on a colonia-wide basis (up to 10 points);~~]

~~(E) the extent to which any previous planning efforts for colonia areas have been accomplished (total--up to 12 points). Applicant was a previous recipient of Colonia Planning Funds and some implementation of previously funded activities or special or extenuating circumstances prohibiting implementation exist. Points will be awarded if applicant is not a previous recipient of a Colonia Planning Fund award. Points will not be awarded if applicant did not implement previously funded activities and no special or extenuating circumstances prohibiting implementation exist;~~]

~~(F) the TxCDBG cost per low to moderate income beneficiary;~~]

(xvii) [~~(i)~~] TxCDBG cost per low to moderate income beneficiary (total--15 points):

(I) the TxCDBG cost per low to moderate income beneficiary is at least 50 percent below the median cost per beneficiary of all eligible applicants (15 points); or

(II) the TxCDBG cost per low to moderate income beneficiary is at or below the median cost per beneficiary of all eligible applicants (10 points); or

(III) the TxCDBG cost per low to moderate income beneficiary is below 150 percent of the median cost per beneficiary of all eligible applicants (7 points); or

(IV) the TxCDBG cost per low to moderate income beneficiary is 150 percent or greater than the median cost per beneficiary of all eligible applicants (5 points).

~~*(ii)* Amount requested originally appears to be reasonable and relates to the described needs with respect to the location and characteristics of the proposed target area (up to 15 points).~~]

(xviii) [~~(G)~~] the availability of grant funds to the applicant for project financing from other sources [~~(total--6 points)~~]. The area would be eligible for funding under the Texas Water Development Board's Economically Distressed Areas Program (EDAP) or other programs as described in the original application(total--6 points).[~~; and~~]

(xix) [~~(H)~~] the applicant's past performance on prior TxCDBG contracts. An applicant can receive from zero to twelve points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. The TxCDBG may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. Applicants that have never received a TxCDBG grant award will automatically receive these points. The TxCDBG will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance may include, but is not necessarily limited to the following:

(I) [~~(i)~~] The applicant's completion of the previous two most recent contracts contract activities within the original contract period (up to 3 points).

(II) [~~(ii)~~] The applicant's submission of the required close-out documents for aforementioned contracts within the period prescribed for such submission (up to 3 points).

(III) [~~(iii)~~] The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any

instances when the monitoring findings included disallowed costs (up to 3 points).

(IV) [~~(iv)~~] The applicant's timely response to audit findings on previous TxCDBG contracts (up to 3 points).

(D) [~~(4)~~] Matching funds (total--20 points). The population category under which county applications are scored is based on the actual number of beneficiaries to be served by the colonia planning activities.

(i) [~~(A)~~] Applicants with populations equal to or less than 1,500 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 5.0% of grant request--20 points;

(II) [~~(ii)~~] match at least 2.0% but less than 5.0% of grant request--10 points;

(III) [~~(iii)~~] match less than 2.0% of grant request--0 points.

(ii) [~~(B)~~] Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 10% of grant request--20 points;

(II) [~~(ii)~~] match at least 2.5% but less than 10% of grant request--10 points;

(III) [~~(iii)~~] match less than 2.5% of grant request--0 points.

(iii) [~~(C)~~] Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 15% of grant request--20 points;

(II) [~~(ii)~~] match at least 3.5% but less than 15% of grant request--10 points;

(III) [~~(iii)~~] match less than 3.5% of grant request--0 points.

(iv) [~~(D)~~] Applicants with populations over 5,000 according to the 2000 census:

(I) [~~(i)~~] match equal to or greater than 20% of grant request--20 points;

(II) [~~(ii)~~] match at least 5.0% but less than 20% of grant request--10 points;

(III) [~~(iii)~~] match less than 5.0% of grant request--0 points.

(E) The marginal applicant is the applicant whose score is high enough for partial funding of the applicant's original grant request. The marginal applicant may scale down the scope of the original project design, and accept the marginal amount, if the reduced project is still feasible. Any unobligated funds remaining in the Colonia Area Planning allocation will be reallocated to either fund additional Colonia Comprehensive Planning applications, Colonia Construction Component applications, or will be reallocated to other established TxCDBG fund categories.

(3) [~~(h)~~] Colonia construction component (200 Total Points Maximum). [~~Selection criteria (colonia comprehensive planning fund).~~] The following is an outline of the selection criteria used by the Office for scoring applications for eligible planning activities under this fund. Two hundred points are available.

(A) [~~(1)~~] Community distress (total--25 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(i) [~~(A)~~] Percentage of persons living in poverty--10 points

(ii) [~~(B)~~] Per capita income--5 points

(iii) [~~(C)~~] Percentage of housing units without complete plumbing--5 points

(iv) [~~(D)~~] Unemployment Rate--5 points

(B) [~~(2)~~] Project design (total--175 points). A colonia planning fund application must receive a minimum score for the project design selection factor of at least 70 percent of the maximum number of points available under this factor to be considered for funding. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund. Each application is scored by the Office staff using the following information submitted in the application:

(i) [~~(A)~~] the severity of need for the comprehensive colonia planning effort and how effectively the proposed comprehensive planning effort will result in a useful assessment of colonia populations, locations, infrastructure conditions, housing conditions, and the development of short-term and long-term strategies to resolve the identified needs [~~(total--140 points)~~];

(I) [~~(i)~~] Evidence of severity of need as described in originally received application (total--100 [~~10~~] points).

(II) [~~(ii)~~] Population (total--10 points). The change in county population from 1990 to current HUD estimate [~~and 2000~~] is between:

(-a-) [~~(I)~~] greater than 2% [~~5%~~] but less than or equal to 4% [~~10%~~] (2 points).

(-b-) [~~(II)~~] greater than 4% [~~10%~~] but less than or equal to 6% [~~15%~~] (4 points).

(-c-) [~~(III)~~] greater than 6% [~~15%~~] but less than or equal to 8% [~~20%~~] (6 points).

(-d-) [~~(IV)~~] greater than 8% [~~20%~~] but less than or equal to 10% [~~25%~~] (8 points).

(-e-) [~~(V)~~] greater than 10% [~~25%~~] (10 points).

[~~(iii) the county population in 2000 (total--10 points):~~]

[~~(I) the county population is at least 50 percent below the median county population of all eligible applicants (10 points).~~]

[~~(II) the county population is at or below the median county population of all eligible applicants (7 points).~~]

[~~(III) the county population is below 150 percent of the median county population of all eligible applicants (5 points).~~]

[(IV) the county population is 150 percent or greater than the median county population of all eligible applicants (2 points).]

(III) [(iv)] Needs are clearly identified in original application by priority through a community needs assessment (total--2 [5] points);

(IV) [(v)] Evidence provided in the original application of [strong] citizen input or known citizen involvement in addressing need (total--2 [5] points);

[(vi) Evidence provided in the original application of effort to notify special groups to solicit information on severity of need (total--5 points);]

(V) [(vii)] Evidence provided in the original application that the public hearings to solicit input on needs were performed as described in the application guide (total--18 [5] points);

(VI) [(viii)] Proposed planning efforts as described in the application are clear, concise and reasonable (total--2 [10] points).

(VII) [(ix)] Proposed planning efforts as described in the application match the needs in the target area (total--2 [25] points).

(VIII) [(x)] Evidence in the application that the county is organized to implement the plan or would ensure that the plan is implemented (total--2 [20] points).

(IX) [(xi)] The description of planning activity in the original application:

(-a-) [(I)] Describes eligible activities (total--1 point [5 points]).

(-b-) [(II)] Describes understanding of plan process (total--1 point [5 points] points).

(-c-) [(III)] Addresses identified needs (total--1 point [5 points]).

(-d-) [(IV)] Appears to result in solution to problems (total--1 point [5 points]).

(-e-) [(V)] Indicates a strategy that can be implemented (total--1 point [5 points]).

(X) [(xii)] Considering the applicant's probable capability, the Colonia Questionnaire in the original application indicates an attempt to control problems and the original submission was complete (total--3 [10] points).

(ii) [(B)] the extent to which any previous planning efforts for colonia areas have been implemented (total--5 [10] points). Applicant was a previous recipient of Colonia Planning Funds and some implementation of previously funded activities or special or extenuating circumstances prohibiting implementation exist. Points will be awarded if applicant is not a previous recipient of a Colonia Planning Fund award. Points will not be awarded if applicant did not implement previously funded activities and no special or extenuating circumstances prohibiting implementation existed;

(iii) [(C)] whether the applicant provides any local matching funds for project activities. (total--12 [13] points). [The population category under which county applications are scored is based on the actual number of beneficiaries to be served by the colonia planning activities;]

(I) At least 20% of TxCDBG requested amount match--12 points.

(II) At least 15% of TxCDBG requested amount but less than 20% match--9 points.

(III) At least 10% of TxCDBG requested amount but less than 15% match--6 points.

(IV) At least 5% of TxCDBG requested amount but less than 10% match--3 points.

(V) Under 5% of TxCDBG requested amount match--0 points.

[(i) Applicants with populations equal to or less than 1,500 according to the 2000 census:]

[(I) match equal to or greater than 5.0% of grant request--13;]

[(II) match at least 2.0% but less than 5.0% of grant request--7;]

[(III) match less than 2.0% of grant request--0.]

[(ii) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:]

[(I) match equal to or greater than 10% of grant request--13;]

[(II) match at least 2.5% but less than 10% of grant request--7;]

[(III) match less than 2.5% of grant request--0.]

[(iii) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:]

[(I) match equal to or greater than 15% of grant request--13;]

[(II) match at least 3.5% but less than 15% of grant request--7;]

[(III) match less than 3.5% of grant request--0.]

[(iv) Applicants with populations over 5,000 according to the 2000 census:]

[(I) match equal to or greater than 20% of grant request--13;]

[(II) match at least 5.0% but less than 20% of grant request--7;]

[(III) match less than 5.0% of grant request--0; and]

(iv) [(D)] the applicant's past performance on previously awarded TxCDBG contracts. An applicant can receive from zero to twelve points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. The TxCDBG may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. Applicants that have never received a TxCDBG grant award will automatically receive these points. The TxCDBG will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance will include, but is not necessarily limited to the following:

(I) [(i)] The applicant's completion of the previous contract, two most recent TxCDBG contracts contract activities within the original contract period (up to 3 points).

(II) [~~(ii)~~] The applicant's submission of the required close-out documents for aforementioned contracts within the period prescribed for such submission (up to 3 points).

(III) [~~(iii)~~] The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs (up to 3 points).

(IV) [~~(iv)~~] The applicant's timely response to audit findings on previous TxCDBG contracts (up to 3 points).

(f) [~~(i)~~] Program guidelines (colonia self-help centers legislative set-aside [~~fund~~]). The colonia self-help centers legislative set-aside [~~fund~~] is administered by the Texas Department of Housing and Community Affairs (TDHCA) under an interagency agreement with the Office. The following is an outline of the administrative requirements and eligible activities under this fund.

(1) The geographic area served by each colonia self-help center shall be determined by the Office or by the TDHCA. Five colonias located in each established colonia self-help center service area shall be designated to receive concentrated attention from the center. Each colonia self-help center shall set a goal to improve the living conditions of the residents located in the colonias designated for concentrated attention within a two-year period set under the contract terms. The Office and the TDHCA have the authority to make changes to the colonias designated for this concentrated attention.

(2) The Office's grant contract for each colonia self-help center is awarded and executed with the county where the colonia self-help center is located. Each county executes a subcontract agreement with a non-profit community action agency or a public housing authority.

(3) A colonia advisory committee is established and not fewer than five persons who are residents of colonias are selected from the candidates submitted by local nonprofit organizations and the commissioners court of a county where a self-help center is located. One committee member shall be appointed to represent each of the counties in which a colonia self-help center is located. Each committee member must be a resident of a colonia located in the county the member represents but may not be a board member, contractor, or employee of or have any ownership interest in an entity that is awarded a contract through the TxCDBG. The advisory committee shall advise the Office and the TDHCA regarding:

(A) the needs of colonia residents;

(B) appropriate and effective programs that are proposed or are operated through the centers; and

(C) activities that may be undertaken through the centers to better serve the needs of colonia residents.

(4) The purpose of each colonia self-help center is to assist low income and very low income individuals and families living in colonias located in the center's designated service area to finance, refinance, construct, improve or maintain a safe, suitable home in the designated service area or in another suitable area. Each self-help center may serve low income and very low income individuals and families by:

(A) providing assistance in obtaining loans or grants to build a home;

(B) teaching construction skills necessary to repair or build a home;

(C) providing model home plans;

(D) operating a program to rent or provide tools for home construction and improvement for the benefit of property owners in colonias who are building or repairing a residence or installing necessary residential infrastructure;

(E) helping to obtain, construct, assess, or improve the service and utility infrastructure designed to service residences in a colonia, including potable water, wastewater disposal, drainage, streets and utilities;

(F) surveying or platting residential property that an individual purchased without the benefit of a legal survey, plat, or record;

(G) providing credit and debt counseling related to home purchase and finance;

(H) applying for grants and loans to provide housing and other needed community improvements;

(I) monthly programs to educate individuals and families on their rights and responsibilities as property owners;

(J) providing other eligible services that the self-help center, with the Office's approval, determines are necessary to assist colonia residents in improving their physical living conditions, including help in obtaining suitable alternative housing outside of a colonia's area;

(K) providing assistance in obtaining loans or grants to enable an individual or family to acquire fee simple title to property that originally was purchased under a contract for a deed, contract for sale, or other executory contract; and

(L) providing access to computers, the internet, and computer training.

(5) A self-help center may not provide grants, financing, or mortgage loan services to purchase, build, rehabilitate, or finance construction or improvements to a home in a colonia if water service and suitable wastewater disposal are not available.

(g) [~~(j)~~] Selection criteria (colonia EDAP fund). The following is an outline of the application information evaluated by a committee composed of the Office's staff.

(1) The proposed use of the colonia EDAP funds including the eligibility of the proposed activities and the effective use of the funds to provide water or sewer connections/yard lines to water/sewer systems funded through the Texas Water Development Board Economically Distressed Area Program.

(2) The ability of the applicant to utilize the grant funds in a timely manner.

(3) The availability of grant funds to the applicant for project financing from other sources.

(4) The applicant's past performance on previously awarded TxCDBG contracts.

(5) Cost per beneficiary.

(6) Proximity of project site to entitlement cities or metropolitan statistical areas.

§255.11. Small Towns Environment Program Fund.

(a) - (f) (No change.)

(g) Selection criteria. The following is an outline of the selection criteria used by the Office for scoring applications under the STEP fund. One hundred twenty (120) points are available. A project must score at least 75 points overall and 15 points under the factor in paragraph (2) of this subsection to be considered for funding.

(1) - (2) (No change.)

(3) Past participation and performance (total--up to 15 points). An applicant receives up to 15 points on the following two factors.

(A) (No change.)

(B) An applicant can receive from zero to five points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. The TxCDBG may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. Applicants that have never received a TxCDBG grant award will automatically receive these points. The TxCDBG will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance may include, but is not necessarily limited to the following:

(i) The applicant's completion of the previous contract activities within the original contract period [~~(total--2 points)~~].

(ii) The applicant's submission of all contract reporting requirements such as Quarterly Progress Reports, Certificates of Expenditures, and Project Completion Reports [~~(total--1 point)~~].

(iii) The applicant's submission of the required close-out documents within the period prescribed for such submission [~~(total--1 point)~~].

(iv) The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs and the applicant's timely response to audit findings on previous TxCDBG contracts [~~(total--1 point)~~].

(v) The applicant's timely response to audit findings on previous TxCDBG contracts.

(4) Percentage of savings off the retail price (total--up to 10 points). For STEP, the percentage of savings off of the retail price is considered a form of community match for the project. In STEP, a threshold requirement is a minimum of 40% savings off the retail price for construction activities. The population category under which county applications are scored is dependent upon the project type and the beneficiary population served. If the project is for beneficiaries for the entire county, the total population of the county is used. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the unincorporated residents for the entire county. For county applications addressing water and sewer improvements in unincorporated areas, the population category is based on the actual number of beneficiaries to be served by the project activities. The population category under which multi-jurisdiction applications are scored is based on the combined populations of the applicants according to the 2000 Census. An applicant can receive from zero to 10 points based on the following population levels and savings percentages:

(A) Communities with populations equal to or less than 1,500 according to the 2000 census:

(i) 55% or more savings--10 points

(ii) 50% - 54.99% savings--9 points

(iii) 45% - 49.99% savings--7 points

(iv) 41% - 44.99% Savings--5 points

(B) Communities with populations above 1,500 but equal to or less than 3,000 according to the 2000 census:

(i) 55% or more savings--10 points

(ii) 50% - 54.99% savings--8 points

(iii) 45% - 49.99% savings--6 points

(iv) 41% - 44.99% Savings--3 points

(C) Communities with populations above 3,000 but equal to or less than 5,000 according to the 2000 census:

(i) 55% or more savings--10 points

(ii) 50% - 54.99% savings--7 points

(iii) 45% - 49.99% savings--5 points

(iv) 41% - 44.99% Savings--2 points

(D) Communities with populations above 5,000 but less than 10,000 according to the 2000 census:

(i) 55% or more savings--10 points

(ii) 50% - 54.99% savings--6 points

(iii) 45% - 49.99% savings--3 points

(iv) 41% - 44.99% Savings--1 point

(E) Communities with populations that are 10,000 or above 10,000 according to the 2000 census:

(i) 55% or more savings--10 points

(ii) 50% - 54.99% savings--5 points

(iii) 45% - 49.99% savings--2 points

(iv) 41% - 44.99% Savings--0 points

(5) Benefit to low/moderate income persons (total--up to 5 points). Applicants are required to meet the 51 percent low/moderate-income benefit for each activity as a threshold requirement. Any project where at least 60 percent of the TxCDBG funds benefit low/moderate-income persons will receive 5 points.

§255.17. Renewable Energy Demonstration Pilot Program.

(a) (No change.)

(b) Selection criteria. The projects will be selected on the following basis. Seventy points are available.

(1) - (5) (No change.)

(6) Leveraging--projects with committed funds from other entities including funding agencies, local governments, or businesses[~~--Percent of portion of total project receiving TxCDBG funds is leveraged with other funds--50%--10 points, 25%--5 points, 10%--3 points, 5%--1 point~~].

(A) Applicant(s) population equal to or less than 2,500 according to the latest decennial Census:

(i) Match equal to or greater than 15% of grant request--10 points

(ii) Match at least 8% but less than 15% of grant request--5 points

(iii) Match at least 3%, but less than 8% of grant request--3 points

(iv) Match at least 2%, but less than 3% of grant request--1 point

(v) Match less than 2% of grant request--0 points

(B) Applicant(s) population equal to or less than 5,000 but over 2,500 according to the latest decennial Census:

(i) Match equal to or greater than 25% of grant request--10 points

(ii) Match at least 13% but less than 25% of grant request--5 points

(iii) Match at least 5%, but less than 13% of grant request--3 points

(iv) Match at least 3%, but less than 5% of grant request--1 point

(v) Match less than 3% of grant request--0 points

(C) Applicant(s) population equal to or less than 10,000 but over 5,000 according to the latest decennial Census:

(i) Match equal to or greater than 35% of grant request--10 points

(ii) Match at least 18% but less than 35% of grant request--5 points

(iii) Match at least 7%, but less than 18% of grant request--3 points

(iv) Match at least 4%, but less than 7% of grant request--1 point

(v) Match less than 4% of grant request--0 points

(D) Applicant(s) population over 10,000 according to the latest decennial Census:

(i) Match equal to or greater than 50% of grant request--10 points

(ii) Match at least 25% but less than 50% of grant request--5 points

(iii) Match at least 10%, but less than 25% of grant request--3 points

(iv) Match at least 5%, but less than 10% of grant request--1 point

(v) Match less than 5% of grant request--0 points

(E) The population category under which county applications are scored is dependent upon the project type and the beneficiary population served. If the project is for beneficiaries for the entire county, the total population of the county is used. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the unincorporated residents for the entire county.

(7) Location in Rural Areas--Projects that benefit cities [~~cites~~] with populations under 10,000 and/or counties under 100,000--5 points.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806717
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: February 8, 2009
For further information, please call: (512) 936-7887

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10 TAC §§255.3, 255.10, 255.12 - 255.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of Rural Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under §487.052 of the Texas Government Code, which provides the Board with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposal.

§255.3. Young v. Martinez Fund.

§255.10. Housing Fund.

§255.12. Microenterprise Fund.

§255.13. Small Business Fund.

§255.14. Section 108 Loan Guarantee Pilot Program.

§255.15. Community Development Supplemental Fund.

§255.16. Non-Border Colonia Fund.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806718
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: February 8, 2009
For further information, please call: (512) 936-7887

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER HH. COMMISSIONER'S RULES CONCERNING EDUCATION IN A JUVENILE RESIDENTIAL FACILITY

19 TAC §89.1801

The Texas Education Agency (TEA) proposes new §89.1801, concerning education in a juvenile residential facility. In accordance with the Texas Education Code (TEC), §37.0062, the proposed new rule would adopt instructional requirements for education services provided by a school district or open-enrollment

charter school in a pre-adjudication or a post-adjudication residential facility.

Juvenile detention centers are short-term, pre-adjudication or post-adjudication secure facilities. Administered by a juvenile board or a privately operated facility certified by the juvenile board, these facilities are designed for the temporary placement of any juvenile or other individual who is accused of having committed an offense and is awaiting court action, an administrative hearing, or other transfer action. Post-adjudication secure correctional facilities operated by the Texas Youth Commission are administered in the same way, but are intended for the treatment and rehabilitation of youth who have been adjudicated.

School districts are required to provide education to students placed in pre-adjudication or post-adjudication juvenile residential facilities, but the level of education varies across the state and in many instances there is minimal education provided to these students due to the lack of education standards.

House Bill (HB) 425, 80th Texas Legislature, 2007, amended the TEC, Chapter 37, by adding the TEC, §37.0062, giving the commissioner of education authority to adopt rules to establish the instructional requirements for education services provided by a school district or open-enrollment charter school in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility operated by a juvenile board or a post-adjudication secure correctional facility operated under contract with the Texas Youth Commission. Until 2007, instructional requirements for education services for residential facilities were not addressed under the TEC, Chapter 37.

HB 425 requires the commissioner to coordinate with the Texas Juvenile Probation Commission and the Texas Youth Commission in determining the instructional requirements in pre- and post-adjudication residential facilities to ensure that students who are detained have access to a quality education.

The proposed new 19 TAC §89.1801 would implement the TEC, §37.0062, by establishing in rule educational standards for instructional requirements for pre- and post-adjudication residential facilities. As directed by statute, the proposed new rule would include provisions relating to the length of the school day, the number of days of instruction provided to students each school year, and the curriculum of the educational program to enable students to maintain progress toward completing high school graduation requirements.

The proposed new rule would require school districts, open-enrollment charter schools, and pre- and post-adjudication residential facilities to maintain documentation of educational services that are provided to students.

Jeff Kloster, associate commissioner for health and safety, has determined that for the first five-year period the new rule is in effect there will be no additional costs for state or local government as a result of enforcing or administering the new rule.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Mr. Kloster has determined that for each year of the first five years the new rule is in effect the public benefit anticipated as a result of enforcing the new rule will be consistent standards for educational services for pre- and post-adjudication residential facilities to ensure that students who are detained under the criminal justice system have access to a quality education. There is no anticipated economic cost to persons who are required to comply with the proposed new rule.

The public comment period on the proposal begins January 9, 2009, and ends February 9, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on January 9, 2009.

The new rule is proposed under the TEC, §37.0062, which authorizes the commissioner of education to adopt rules necessary to establish instructional requirements for alternative education services in juvenile residential facilities.

The proposed new rule implements the TEC, §37.0062.

§89.1801. Instructional Requirements for Education Services Provided in a Juvenile Residential Facility.

(a) Definition. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Pre-adjudication secure detention facility--A secure facility administered by a governing board that includes construction and fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility and is used for the temporary placement of any juvenile or other individual who is accused of having committed an offense and is awaiting court action, an administrative hearing, or other transfer action.

(2) Post-adjudication secure correctional facility--A secure facility administered by a governing board or the Texas Youth Commission that includes construction and fixtures designed to physically restrict the movements and activities of the residents and is intended for the treatment and rehabilitation of youth who have been adjudicated. A post-adjudication secure correctional facility does not include any non-secure residential program operating under the authority of a juvenile board as defined by the Texas Family Code, §51.12(j).

(3) Resident--A juvenile or other individual who has been admitted into a pre-adjudication secure detention facility or a post-adjudication secure correctional facility.

(4) Residential facility--A facility as described by the Texas Education Code (TEC), §5.001(8).

(5) School district--The educational service provider in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility. For the purposes of this subchapter, the definition of school district includes open-enrollment charter school.

(b) Enrollment.

(1) The school district providing the education services in a pre-adjudication secure detention facility shall ensure that a student is enrolled in its school district or, by local agreement, in the student's locally-assigned school district on the first school day after the student's arrival at the facility unless it is confirmed that the student will return to a different district within ten days. The school district that maintains a student's enrollment is responsible for ensuring that appropriate education services are provided to each of its students while in the facility.

(2) The school district providing the education services in a post-adjudication secure correctional facility shall ensure that a student

is enrolled in its school district or, by local agreement, in the student's locally-assigned school district on the student's first school day in the facility as a court-committed juvenile.

(3) The school district in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility shall coordinate with the student's previous locally-assigned campus to ensure that appropriate academic records are received within ten school days of the student's enrollment.

(c) Class size. The school district shall ensure that the classroom ratio does not exceed one certified educator to 24 students per class period.

(d) Pre-assessment. The school district shall ensure that a pre-assessment is administered to students in a post-adjudication secure correctional facility. The pre-assessment shall:

(1) be administered within ten school days from the student's first day of enrollment; and

(2) at a minimum, evaluate the student's basic reading and mathematics skills in relation to their current grade level.

(e) Curriculum of the educational program.

(1) Each school district in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility shall, at a minimum, provide students with the subjects and courses necessary to complete the minimum high school program, as specified in §74.62 of this title (relating to Minimum High School Program).

(2) Each school district in a pre-adjudication secure detention facility shall ensure that a student is provided courses that afford an opportunity of continued progress toward the completion of the minimum high school program, as specified in §74.62 of this title.

(3) Each school district in the post-adjudication secure correctional facility shall, at a minimum, provide a student curriculum that enables the student the opportunity to complete the requirements of the minimum high school program, as specified in §74.62 of this title.

(4) The school district in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility shall ensure that the educational services of the students consist of curriculum that is aligned with the requirements described in the TEC, §28.002, and the Texas Essential Knowledge and Skills (TEKS).

(5) The school district in a post-adjudication secure correctional facility shall provide students, ages 15-18 and identified as appropriate candidates, the opportunity and resources to prepare for the five general educational development examinations.

(f) Award of credit. The school district in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility shall grant credits for coursework completed to ensure that high school credit is awarded to students for the successful completion of required courses while enrolled in educational services at the facility.

(g) Length and number of school days required.

(1) The school district in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility shall, at a minimum, provide a seven-hour school day that consists of at least five and one-half hours of required secondary curriculum to students in the facility. For each school year, each school district must operate so that the facility provides for at least 180 days of instruction for students.

(2) The school district in a pre-adjudication secure detention facility or a post-adjudication secure correctional facility shall ensure that students with disabilities are provided instructional days commensurate with those provided to students without disabilities in accordance with requirements contained in §89.1075(d) of this title (relating to General Program Requirements and Local District Procedures).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200806652
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 162. SUPERVISION OF MEDICAL SCHOOL STUDENTS

22 TAC §162.1

The Texas Medical Board proposes an amendment to §162.1, concerning Supervision of Medical Students.

The amendment to §162.1 provides for the supervision of a medical student who is not enrolled at a Texas medical school as a full-time student or visiting student.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes the rule review for Chapter 162.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to set forth requirements for the supervision of a medical student who is not enrolled at a Texas medical school as a full-time student or visiting student.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§162.1. Supervision of Medical Students.

(a) In order to supervise a medical student: [:]

(1) a physician must have an active and unrestricted Texas license, and the medical student must meet the following criteria:

(A) [~~(1)~~] is enrolled at a Texas medical school; or

(B) [~~(2)~~] is a student at a medical school located outside Texas and is enrolled as a visiting student at a Texas medical school; or

(2) a physician must:

(A) have an active and unrestricted Texas license; and

(B) hold a faculty position in the graduate medical education program in the same specialty in which the student will receive undergraduate medical education; and

(C) supervise the student during the educational period; and

(D) [~~(3)~~] the medical student must [~~will~~] receive supervised medical education in either a Texas hospital or teaching institution, which sponsors or participates [~~sponsoring or participating~~] in a program of graduate medical education accredited by the Accrediting Council for Graduate Medical Education, the American Osteopathic Association, or the Texas Medical Board in the same subject as the medical or osteopathic medical education in which the hospital or teaching institution has an agreement with the applicant's school.

(b) If the physician is not licensed in Texas as required in subsection (a) of this section, the physician must be employed by the federal government and maintain an active and unrestricted license.

(c) Physician applicants who receive medical education in the United States in settings that do not comply with statutory requirements set forth in Texas Occupations Code §155.003(b) - (c) may be ineligible for licensure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200806704
Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
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For further information, please call: (512) 305-7016

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CHAPTER 171. POSTGRADUATE TRAINING PERMITS

22 TAC §171.7

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Medical Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Medical Board proposes the repeal of §171.7, concerning Inactive Status.

The repeal of §171.7 deletes a provision that recognizes an inactive status of a physician in training permit.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications to state or local government as a result of enforcing the repeal as proposed. There will be no effect to individuals required to comply with the repeal as proposed.

Mr. Simpson also has determined that for each year of the first five years the repeal as proposed is in effect the public benefit anticipated as a result of enforcing the repeal of the section will be to delete from the Board's rules a provision regarding inactive status of a physician in training permit that is no longer necessary.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The repeal is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§171.7. Inactive Status.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 172. TEMPORARY AND LIMITED LICENSES

SUBCHAPTER B. TEMPORARY LICENSES

22 TAC §172.8

The Texas Medical Board proposes an amendment to §172.8, concerning Faculty Temporary License.

The amendment to §172.8 changes the rule to correspond to statutory authority.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to reflect the change in statutory authority that became effective August 9, 2008.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§172.8. Faculty Temporary License.

(a) The board may issue a faculty temporary license to practice medicine to a physician in accordance with §155.104, Tex. Occ. Code. "Physician," as used in that statute and in this section, is interpreted to mean a person who holds an M.D., D.O., or equivalent degree and who is licensed to practice medicine in another state or Canadian province or has completed at least three years of postgraduate residency, but does not hold a license to practice medicine in this state.

(1) - (2) (No change.)

(3) "Institution," as used in this section, shall mean any of the following:

(A) (No change.)

(B) The University of Texas Health Center at Tyler; or

(C) The University of Texas M.D. Anderson Cancer Center. [~~; or~~]

[~~(D) a program of graduate medical education, accredited by the Accreditation Council for Graduate Medical Education, that exceeds the requirements for eligibility for first board certification in the discipline.~~]

(4) - (5) (No change.)

(b) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 175. FEES, PENALTIES AND FORMS

22 TAC §175.1, §175.3

The Texas Medical Board proposes amendments to §175.1, concerning Application Fees, and §175.3, concerning Penalties.

The amendment to §175.1 corrects fees charged for application for surgical assistant licenses and penalty fees for surgical assistants and physician assistants. The amendment to §175.3 corrects penalty fees in accordance with statutory requirements.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to correct the amount of fees charged for application for surgical assistant licenses and penalty fees for surgical assistants and physician assistants.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§175.1. Application Fees.

The board shall charge the following fees for processing an application for a license or permit:

(1) - (5) (No change.)

(6) Surgical Assistants:

(A) Surgical assistant licensure--$300 [~~(includes surcharge of $5)--$305~~].

(B) (No change.)

§175.3. Penalties.

In addition to any other application, registration, or renewal fees, the board shall charge the following late fee penalties:

(1) (No change.)

(2) Physician Assistants:

(A) Physician assistant's registration permit expired for 90 days or less--half the registration fee [~~$78~~].

(B) Physician assistant's registration permit expired for longer than 90 days but less than one year--full registration fee [~~$156~~].

(3) Acupuncturists/Acudetox Specialists:

(A) Acupuncturist's registration permit expired for 90 days or less--half the registration fee [~~$128~~].

(B) Acupuncturist's registration permit expired for longer than 90 days but less than one year--full registration fee [~~$256~~].

(C) Renewal of acudetox specialist certification expired for less than one year--$25.

(4) - (5) (No change.)

(6) Surgical Assistants:

(A) Surgical Assistant's registration permit expired for 90 days or less--half the registration fee [~~$201~~].

(B) Surgical Assistant - registration permit expired for longer than 90 days but less than one year--full registration fee [$402].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 189. COMPLIANCE PROGRAM

22 TAC §§189.1, 189.2, 189.4

The Texas Medical Board proposes amendments to §189.1, concerning Purpose and Scope, §189.2, concerning Definitions, and §189.4, concerning Limitations on Physician Probationer's Practice.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes the rule review of Chapter 189.

The amendment to §189.1 adds a citation to statutory authority authorizing the Board to promulgate rules relating to the development of a program to monitor compliance of license holders who are subject to disciplinary action. The amendment to §189.2 updates the names of the Texas Medical Board and the Texas Physician Assistant Board and adds chart monitoring to the definition of a monitoring physician. The amendment to §189.4 adds a provision recognizing Board Rule §185.2(19), which provides that a physician with a restricted license may not supervise or delegate prescriptive authority to a physician assistant.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to clarify the authority of the board to adopt rules relating to the development of a program to monitor compliance of license holders who are subject to disciplinary action.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§189.1. Purpose and Scope.

(a) - (b) (No change.)

(c) Authority. Pursuant to §164.010 of the Act, the Board is authorized to promulgate rules relating to the development of a program to monitor compliance of license holders who are subject to disciplinary action.

§189.2. Definitions.

(a) Act--Title 3, Subtitle B, Chapters [~~Chapter~~] 151 - 165, Tex. Occ. Code Ann. for physicians; Title 3, Subtitle C, Chapter[~~,~~] 204, Tex. Occ. Code Ann. for physician assistants; Title 3 Subtitle C, Chapter 206, Tex. Occ. Code Ann. for surgical assistants; and Title 3, Subtitle C, Chapter 205, Tex. Occ. Code Ann. for acupuncturists.

(b) (No change.)

(c) Agency--The divisions, departments, and employees of the Texas Medical Board [~~State Board of Medical Examiners~~], the Texas Physician Assistant [~~State~~] Board [~~of Physician Assistant Examiners~~], and the Texas State Board of Acupuncture Examiners.

(d) - (f) (No change.)

(g) Board--The [~~the~~] appointed members of the Medical Board [~~of Medical Examiners~~] for physicians and surgical assistants, the Physician Assistant Board [~~of Physician Assistants~~] for physicians assistants, and the Board of Acupuncture for acupuncturists.

(h) Board representative--A [~~a~~] board member or district review committee member who sits on a panel at a proceeding to determine compliance with an order.

(i) - (m) (No change.)

(n) Modification/termination hearing--A [~~a~~] hearing before board representatives conducted upon the written request of a probationer for the modification of one or more terms and conditions of an order, the termination of an order prior to the prescribed termination of an order, or the reinstatement of a license following a suspension.

(o) Monitoring physician--A licensed Texas physician who meets the requirements as set out in §189.11 of this title (relating to Process for Approval of Physicians, Other Professionals, Group Practices and Institutional Settings) and who reviews a probationer's medical/billing records and/or conducts onsite reviews of a probationer's practice site on a periodic basis for the purpose of monitoring and educating a probationer, and periodically reports in writing to the board on the probationer's medical practice and practice of medicine as stipulated by an order.

(p) - (r) (No change.)

(s) Proctor--A licensed Texas physician who meets the requirements as set out in §189.11 of this title [~~(relating to Process for Approval of Physicians, Other Professionals, Group Practices and Institutional Settings)~~] and who physically and actually works with and oversees a probationer's practice of medicine on a daily basis and periodically reports in writing to the board on the probationer's medical practice and practice of medicine as stipulated by an order.

(t) SOAH--The State Office of Administrative Hearings.

(u) Supervising physician--A licensed Texas physician who meets the requirements as set out in §189.11 of this title [~~(relating to Process for Approval of Physicians, Other Professionals, Group Practices and Institutional Settings)~~] and who is physically present at a probationer's practice on a daily basis in order to evaluate, educate, and provide guidance regarding the probationer's practice of medicine; and

periodically reports in writing to the board on probationer's medical practice and practice of medicine as stipulated by an order.

§189.4. Limitations on Physician Probationer's Practice.

(a) - (c) (No change.)

(d) Notwithstanding subsections (a) and (b) of this section, a probationer with a restriction on his or her license and therefore does not have an unrestricted license as defined by §185.2(19) of this title (relating to Definitions) may not supervise or delegate prescriptive authority to a physician assistant.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 169. ZOONOSIS CONTROL SUBCHAPTER D. STANDARDS FOR ALLOWABLE METHODS OF EUTHANASIA FOR ANIMALS IN THE CUSTODY OF AN ANIMAL SHELTER

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §169.81 and §169.82, new §169.83 and §169.84, and the repeal of §169.83, concerning the standards for allowable methods of euthanasia for animals in the custody of an animal shelter.

BACKGROUND AND PURPOSE

The amendments, repeal, and new sections are necessary to comply with Health and Safety Code, Chapter 821, Subchapter C, "Euthanasia of Animals," which provides the Executive Commissioner of the Health and Human Services Commission with the authority to administer the chapter and adopt rules necessary to effectively administer the program.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 169.81 - 169.83 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are mandated.

Specifically, the sections cover purpose, definition, animal identification and owner notification, and allowable methods of euthanasia.

After carefully considering the alternatives, the department believes the rules as amended, repealed, and the new sections added are the best method of implementing the statute to protect the public health with rules on the standards for allowable methods of euthanasia for animals in the custody of an animal shelter in the State of Texas.

SECTION-BY-SECTION SUMMARY

The amendment to §169.81 provides clarification and modifies the language to make it more concise. The amendment to §169.82 provides clarification of the term "animal shelter." The repeal and new §169.83 adds new language to provide instruction to animal shelter personnel on attempts to identify animal ownership and notifying owners prior to euthanasia. The new §169.84 is the renumbered §169.83 that was moved for better flow of the rules and reorganized for clarity; and the new §169.84 updates euthanasia standards to be in compliance with the revised *American Veterinary Medical Association Guidelines on Euthanasia.*

The proposed revisions to the sections update and clarify language to enable those subject to the sections to more readily comply. The rules promote humane euthanasia for these animals and promote public health and safety.

FISCAL NOTE

Adolfo Valadez, M.D., MPH, Division Director, Prevention and Preparedness Services, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed, because the procedures for administering euthanasia have not substantively changed.

SMALL AND MICRO-BUSINESS ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

Dr. Valadez has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that animal shelters are not operated by small businesses and micro-businesses and, therefore, they will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment. Therefore, an economic impact statement and regulatory flexibility analysis for small and micro-businesses are not required.

PUBLIC BENEFIT

In addition, Dr. Valadez has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of clarifying language in the sections will be to promote humane euthanasia of animals and to promote public health and safety.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a

sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Sidwa, DVM, Department of State Health Services, Community Preparedness Section, Zoonosis Control Branch, MC 1956, P.O. Box 149347, Austin, Texas 78714-9347, or by email to Tom.Sidwa@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

25 TAC §§169.81 - 169.84

STATUTORY AUTHORITY

The proposed amendments and new rules are authorized by Health and Safety Code, Chapter 821, "Euthanasia of Animals," §821.053, which requires the Executive Commissioner of the Health and Human Services Commission to establish the requirements and procedures for administering sodium pentobarbital to euthanize an animal in the custody of an animal shelter; §821.054, which requires the Executive Commissioner of the Health and Human Services Commission to establish standards for a carbon monoxide chamber used to euthanize an animal in the custody of an animal shelter and the requirements and procedures for administering commercially compressed carbon monoxide to euthanize an animal in the custody of an animal shelter; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The amendments and new rules affect Health and Safety Code, Chapters 821 and 1001; and Government Code, Chapter 531.

§169.81. Purpose.

The purpose of these sections is to set standards for allowable methods of euthanasia for an animal(s) [~~animals~~] in the custody of an animal shelter, in accordance with the Texas Health and Safety Code, Chapter 821.

§169.82. Definition.

In this chapter, animal [~~The following term, when used in these rules, shall have the following meaning, unless the context clearly indicates otherwise:~~ ~~Animal~~] shelter, unless the context clearly indicates otherwise, means a [~~--A~~] facility that collects, impounds, or keeps stray, homeless, abandoned, or unwanted animals.

§169.83. Animal Identification and Owner Notification.

Prior to euthanasia, each animal should first be scanned for microchip identification and searched for identification tattoos. If identification is located on an animal or the animal is wearing a tag(s), reasonable efforts to locate and notify the animal's owner shall be made prior to euthanasia.

§169.84. Allowable Methods of Euthanasia.

(a) Only sodium pentobarbital or commercially compressed carbon monoxide gas may be used to euthanize a dog or cat in the custody of an animal shelter.

(b) When sodium pentobarbital is used to euthanize an animal, the following requirements apply.

(1) Persons administering sodium pentobarbital must be thoroughly trained in the proper methods and techniques for euthanizing animals. A person has until the 120th day following the date of initial employment to complete this training.

(2) The routes of injections of sodium pentobarbital, listed in the order of preference, shall be:

(A) intravenous injection by hypodermic needle;

(B) intraperitoneal injection by hypodermic needle; or

(C) intracardiac injection by hypodermic needle.

(3) Any injection must be administered using an undamaged sterilized hypodermic needle of a size suitable for the size and species of the animal.

(4) Injection shall be conducted in an area out of public view and out of the view of another animal; additionally, the carcass of any animal(s) shall be removed from the euthanasia area prior to a live animal entering that area.

(5) The area used for injection shall have sufficient lighting to allow for visual accuracy during the injection process.

(6) A dose of sodium pentobarbital appropriate for the animal's weight shall be administered to that animal.

(7) Each animal given sodium pentobarbital by intraperitoneal injection must be given 3 to 4 times the intravenous dose.

(8) Each animal given sodium pentobarbital by intraperitoneal injection shall be placed in a quiet area, separated from physical contact with any other animal(s) during the dying process.

(9) Intracardiac injection may not be used unless the animal is heavily sedated, unconscious, or anesthetized.

(10) The carcass of any animal(s) euthanized by sodium pentobarbital must be stored and disposed of in a manner that minimizes the potential for scavenging by animals or humans.

(c) When commercially compressed carbon monoxide gas is used to euthanize an animal(s), the following requirements apply.

(1) It must be performed in a commercially manufactured carbon monoxide chamber or one designed and constructed, at a minimum, to equal the effectiveness of a commercially manufactured chamber.

(2) The chamber must be located outdoors or in a well-ventilated room.

(3) The chamber must be airtight and equipped with the following:

(A) an exhaust fan for indoor chambers which is capable of evacuating all gas from the chamber prior to the chamber being opened and is connected by a gas-type duct to the outdoors;

(B) a gas flow regulator and flow meter for the canister;

(C) a gas concentration gauge;

(D) an accurate temperature gauge for monitoring the interior of the chamber;

(E) if located indoors, a carbon monoxide monitor on the exterior of the chamber that is connected to an audible alarm system, which will sound in the room containing the chamber;

(F) explosion-proof electrical equipment if equipment is exposed to carbon monoxide;

(G) a view-port with either internal lighting or external lighting sufficient to allow visual surveillance of any animal(s) within the chamber; and

(H) if designed to euthanize more than one animal at a time, independent sections or cages to separate individual animals.

(4) The gas concentration process must achieve at least a 6% carbon monoxide gas concentration not to exceed 10% due to flammability and explosiveness throughout the chamber within 5 minutes after the introduction of carbon monoxide into the chamber is initiated.

(5) The ambient temperature inside the chamber should not exceed 85 degrees Fahrenheit (29.4 degrees Celsius) when it contains a live animal(s).

(6) All equipment, as specified in paragraph (3)(A) - (H) of this subsection, must be in proper working order and used at all times during the operation of the chamber.

(7) An animal(s) must not be removed from the chamber until at least 5 minutes after cessation of respiratory movement.

(8) The chamber must be thoroughly vented prior to removing any carcasses.

(9) The chamber must be thoroughly cleaned after the completion of each cycle. Chamber surfaces must be constructed and maintained so they are impervious to moisture and can be readily sanitized.

(10) Persons operating the chamber must be thoroughly trained in the proper methods and techniques for euthanizing animals. A person has until the 120th day following the date of initial employment to complete this training.

(11) Operation, maintenance, and safety instructions and guidelines must be displayed prominently in the area containing the chamber.

(12) Carbon monoxide shall not be used to euthanize any animal reasonably presumed to be less than 16 weeks of age. Carbon monoxide shall also not be used to euthanize any animal that could be anticipated to have decreased respiratory function, such as the elderly, sick, injured, or pregnant. Such animals are resistant to the effects of carbon monoxide and the time required to achieve death in these animals may be significantly increased. In animals with decreased respiratory function, carbon monoxide levels rise slowly, making it more likely that these animals will experience elevated levels of stress.

(13) Only compatible animals of the same species may be placed in the chamber simultaneously.

(14) No live animal(s) may be placed in the chamber with a dead animal(s).

(d) Any animal other than cats and dogs, including birds and reptiles, in the custody of an animal shelter shall be humanely euthanized only in accordance with the methods, recommendations, and procedures prepared by the American Veterinary Medical Association (AVMA) and set forth in the *AVMA Guidelines on Euthanasia* (June 2007) applicable to each species of animal.

(e) When using any of the allowable methods of euthanasia, each animal must be monitored between the time euthanasia procedures have commenced and the time death occurs, and the animal's body must not be disposed of until death is confirmed by examination of the animal for cessation of vital signs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806715
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: February 8, 2009
For further information, please call: (512) 458-7111 x6972

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25 TAC §169.83

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeal is authorized by Health and Safety Code, Chapter 821, "Euthanasia of Animals," §821.053, which requires the Executive Commissioner of the Health and Human Services Commission to establish the requirements and procedures for administering sodium pentobarbital to euthanize an animal in the custody of an animal shelter; §821.054, which requires the Executive Commissioner of the Health and Human Services Commission to establish standards for a carbon monoxide chamber used to euthanize an animal in the custody of an animal shelter and the requirements and procedures for administering commercially compressed carbon monoxide to euthanize an animal in the custody of an animal shelter; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

The repeal affects Health and Safety Code, Chapters 821 and 1001; and Government Code, Chapter 531.

§169.83. Allowable Methods of Euthanasia.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806716

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: February 8, 2009
For further information, please call: (512) 458-7111 x6972

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 34. REGULATION OF LOBBYISTS

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §34.5

The Texas Ethics Commission withdraws the proposed amendment to §34.5 which appeared in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5440).

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806699
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: December 29, 2008
For further information, please call: (512) 463-5800

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1 TAC §34.22

The Texas Ethics Commission withdraws the proposed new §34.22 which appeared in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5440).

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806700
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: December 29, 2008
For further information, please call: (512) 463-5800

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 102. EDUCATIONAL PROGRAMS

SUBCHAPTER FF. COMMISSIONER'S RULES CONCERNING EDUCATOR AWARD PROGRAMS

19 TAC §102.1071

Proposed amended §102.1071, published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4782), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on December 23, 2008.

TRD-200806677

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 7. CLEAN AIR INTERSTATE RULE

30 TAC §§101.502, 101.504, 101.506, 101.508

Proposed amended §§101.502, 101.504, 101.506, and 101.508, published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4802), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on December 23, 2008.

TRD-200806678

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CHAPTER 330. MUNICIPAL SOLID WASTE

SUBCHAPTER D. OPERATIONAL STANDARDS FOR MUNICIPAL SOLID WASTE LANDFILL FACILITIES

30 TAC §330.165

Proposed amended §330.165, published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4815), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on December 23, 2008.

TRD-200806679

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.25

The Finance Commission of Texas (commission), on behalf of the Department of Banking (department), adopts the repeal of §25.25, concerning conversion from trust to insurance funded benefits, without changes to the proposal as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5172). New §25.25, concerning conversion from trust to insurance funded benefits, is simultaneously adopted in this issue of the *Texas Register.*

Existing prepaid contracts for trust-funded prepaid funeral benefits may be converted to insurance-funded prepaid funeral benefits under Finance Code, §154.204, if the department finds that the proposed insurance-funded arrangement safeguards the rights and interests of the individuals who purchased the prepaid contracts to substantially the same degree as the trust-funded arrangement proposed to be replaced. Rule §25.25 was designed to specify the required content of an application under Finance Code, §154.204. Developments since the adoption of existing §25.25 in 1996 require these provisions to be updated, as described in the adoption preamble for new §25.25 elsewhere in this issue of the *Texas Register.* Existing §25.25 must be repealed to permit adoption of new §25.25.

The Department received no comments specifically regarding the proposed repeal of existing §25.25. Comments received regarding proposed new §25.25 are addressed in the adoption preamble for new §25.25, simultaneously published in this issue of the *Texas Register.*

The repeal is adopted pursuant to Finance Code, §154.204, which provides for department approval of a conversion from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits to safeguard the rights and interests of the individual who purchases a prepaid funeral benefits contract, and pursuant to Finance Code, §154.051, which authorizes the commission to adopt rules relating to the enforcement and administration of Chapter 154.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2008.

TRD-200806646
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: January 8, 2009
Proposal publication date: July 4, 2008
For further information, please call: (512) 475-1300

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7 TAC §25.25

The Finance Commission of Texas (commission), on behalf of the Department of Banking (department), adopts new §25.25, concerning conversion from trust-funded to insurance-funded benefits under Finance Code, §154.204, with changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5172). Existing §25.25, concerning conversion from trust to insurance funded benefits, is simultaneously repealed in this issue of the *Texas Register.*

Changes made to the proposed rule are in response to public comment received in writing and at a public hearing held on July 30, 2008, as further described in this preamble. Other changes were made for consistency and to correct typographical or grammatical errors.

Finance Code, Chapter 154 (Chapter 154), and rules adopted under Chapter 154, codified in Title 7, Chapter 25 of the Texas Administrative Code (TAC), provide an exclusive regulatory framework that allows a person in this state to arrange and pay for a funeral in advance of need. Chapter 154 imposes a duty upon the department and grants the department the authority to license and regulate sellers of prepaid funeral benefits to ensure that prepaid funeral benefits contracts (prepaid contracts) are performed and funded in accordance with their terms at the time of need.

Existing prepaid contracts for trust-funded prepaid funeral benefits may be converted to insurance-funded prepaid funeral benefits under Finance Code, §154.204, if: (1) the department finds that the proposed insurance-funded arrangement safeguards the rights and interests of the individuals who purchased the prepaid contracts (purchasers) to substantially the same degree as the trust-funded arrangement, and (2) each purchaser is notified in writing of the terms of the proposed conversion and the purchaser's right to decline the conversion.

Section 25.25 was designed to specify the required form of an application for conversion and to nominally address the required notice to purchasers. Developments since the 1996 adoption of existing §25.25 have outpaced its content. The required revi-

sions were extensive enough to warrant repeal and replacement of the old rule with a new rule.

Licensed sellers of insurance-funded prepaid funeral benefits are now either insurance companies or affiliates of insurance companies that sell through designated funeral providers acting as agent, both for the seller with respect to the contract, and for the insurance company with respect to the funding insurance policy. Insurance companies that wish to participate in the Texas preneed market will often form a subsidiary to acquire a license under Chapter 154. A number of these affiliate sellers resist accepting responsibility for verifying that funeral services and merchandise are ultimately delivered in accordance with the contract and for maintaining the records the department requires for examination. In addition, a recent failure of an insurance-funded permit holder and its affiliated insurance company has raised concerns about the financial viability and sustainability of insurance-funded permit holders. Selling insurance-funded prepaid funeral benefits involves incurring long-term regulatory commitments in exchange for immediate, front-loaded compensation. Permit holders that lack the resources to fulfill their responsibilities in the later years of a contract's existence are at risk of failure.

Pursuant to Finance Code, §154.204(a), the department cannot approve a proposed conversion unless it finds that the proposed insurance-funded arrangement will safeguard the rights and interests of purchasers to substantially the same degree as the trust-funded arrangement sought to be replaced. Among other matters, unless the applicant demonstrates to the satisfaction of the department that the insurance-funded contracts will be performed and funded in compliance with their terms and Chapter 154, and that the post-conversion permit holder will maintain or have access to the records the department requires to determine such compliance, the department will not be able to make the required finding, and the application for conversion will not be approved.

As a result of these concerns, new §25.25 specifies information regarding the business plan and financial condition of the post-conversion permit holder that is necessary for the department to make the required determinations. The application for conversion must demonstrate that the post-conversion permit holder has or will have access to the financial and other resources necessary to discharge its contractual and statutory obligations as a permit holder, and that the post-conversion permit holder recognizes its future responsibilities to administer its unmatured contracts until finally performed, to verify that each contract is performed and funded in accordance with its terms and Chapter 154, and to maintain the records required under 7 TAC §25.10. Further, the applicant (the trust-funded permit holder seeking to convert its portfolio of contracts to insurance funding) must be willing to again seek licensure and take over administration and management of the converted contracts that remain outstanding, in the event the post-conversion permit holder were to fail.

Finance Code, §154.204(b), requires that each purchaser be notified in writing of the terms of the proposed conversion and given the opportunity to decline the conversion and remain in the existing trust-funded arrangement. Under former §25.25, the notice text was required to be filed with the application, but the only specific requirement regarding the content of the notice was that it contain a statement that the purchaser has 60 days to file a written request with the department to have the contract converted back to trust-funded benefits. Over time, the notice came more to resemble a sales pitch than a balanced disclosure of information relevant to the decision a purchaser must make: whether to permit the conversion by doing nothing, or decline the conversion by sending a written request to the department. Further, the former rule did not address the method or manner of notice delivery or attempt to verify that a purchaser actually received the notice.

Because the conversion notice is a key statutory predicate to conversion under Finance Code, §154.204, new §25.25 is designed to enhance notice content as well as the prospect for actually getting the notice to the attention of each purchaser. Content is enhanced by requiring a brief but fair disclosure of the terms of conversion and the impact of conversion on the purchaser and the purchaser's contract. Promotional statements or claims that express subjective rather than objective views of the merits or benefits of conversion are prohibited. In addition, the rule as adopted enhances the prospect that each purchaser will actually receive the notice. First, §25.25(e)(2)(A) requires the notice to be sent by certified mail or by another form of mail that requires or provides proof of delivery to the last known address of the purchaser. A failed delivery will identify those purchasers for whom notification requires additional effort, as provided in §25.25(e)(3)(B). Second, §25.25(e)(2)(B) requires publication of a newspaper notice as a supplemental means of notifying purchasers. Both the proposed notice letter and the proposed newspaper notice must be filed as part of the application.

Two interested groups or associations offered comment on proposed §25.25, the Funeral Consumers Alliance of Texas (FCAT) and the Texas Pre-Need Coalition (TPNC), both of which were against adoption of new §25.25, but for different reasons. Summaries of all comments received and commission responses follow.

FCAT objects generally to the lack of a requirement to obtain the informed consent of each purchaser of a trust-funded contract to be converted. FCAT believes the proposed new section creates what it calls a "force-over" by automatically converting contracts if the consumer fails to respond or fails to act promptly to decline the conversion. Further FCAT speculates that the "force-over" is designed to generate funding to address the cost of resolving a recent insurance company failure that involves thousands of insurance-funded prepaid contracts. The commission disagrees and believes FCAT misunderstands the governing law. The so-called "force-over" is statutory in nature and is not a new creation by rule. Under Finance Code, §154.204(b), the existing contract holder or purchaser has the right to receive notice and the right to decline conversion, and nothing more. As adopted, new §25.25 improves the quality of disclosures in the notice and improves the likelihood that a consumer will actually receive the notice, as compared to the now repealed prior version of §25.25.

TPNC objects generally to requirements that force the permit holder to assume obligations that are not currently required by the law simply in order to perform a conversion, which is permitted by the law. Specifically, TPNC objects to forcing permit holders to assume responsibility for the delivery at need of a pre-need funeral. Another commenter makes the same objection specifically with respect to the standard in §25.25(b)(1)(D), requiring the permit holder to verify that the converted contracts are performed in accordance with their terms, and asserts that the department lacks statutory authority to require verification. The commission disagrees. New §25.25(b) describes the general standards applicable to a determination of whether a proposed conversion will safeguard the rights and interests of the

purchasers to substantially the same degree as the trust-funded benefits arrangement sought to be replaced, as required by Finance Code, §154.204. Subsection (b)(1)(D) does not directly impose any obligation to verify contract performance but rather indicates that a proposed conversion cannot be approved if the post-conversion permit holder refuses to acknowledge its acceptance of a seller's regulatory responsibilities under Chapter 154. These responsibilities with respect to each converted contract continue well beyond the date the contract was created and sold, see Finance Code, §154.107. Because of the previously described compliance issues, new §25.25(b)(1)(D) specifically addresses verification of contract performance. A seller is required by 7 TAC §25.10(c)(3)(A)(ii) to verify contract performance by documenting any upgrades or downgrades or discounts or credits given at the time of contract performance, and explaining any cost differences between the prepaid and the at-need contracts. Section 25.10(c)(3)(A)(ii) was adopted pursuant to Finance Code §154.051 and §154.053. This required acknowledgement of continuing seller responsibilities under Chapter 154, responsibilities imposed by statutes or rules other than §25.25, is certainly not equivalent to requiring a permit holder to assume responsibility for actually delivering or performing the funeral itself. Section 25.25(b)(1)(D) does not independently create an affirmative duty to verify or investigate contract performance.

The commenter expressed similar objections to the contractual requirement of §25.25(c)(2)(C)(iii), that the permit holder agree to verify that each prepaid contract is performed by the funeral provider at maturity in accordance with its terms, and §25.25(c)(2)(C)(iv), that the permit holder verify that any additional charges imposed by the funeral provider and collected from the decedent's representatives are for additional services or merchandise not otherwise contemplated by and funded under the prepaid contract and, if not, promptly refund or require the funeral provider to refund any prepaid contract overcharges to the decedent's representatives. The commenter recommends that the rule simply require a statement in the application that the funeral provider is responsible for refunding overcharges to the decedent's representatives. The commission disagrees. The term "overcharges" refers to additional payments to the funeral provider from the family of the deceased for items of funeral merchandise or service that should have been considered prepaid. While primary liability for a refund of overcharges would appear to fall on the funeral provider, the seller, as the only party to the contract that is licensed to sell a prepaid funeral, bears liability if the delivered funeral falls short of the funeral promised by the seller at the time the contract was sold. Liability for refunding overcharges can be clearly placed with the funeral provider through a contract between the permit holder and the funeral provider.

The commenter also points out that a good faith dispute could arise between the funeral provider and consumer over the scope of preneed services, and asserts that the permit holder has no legal or statutory authority to act as judge and impose a resolution on either party. The commission agrees that a good faith dispute could complicate this duty. However, the funeral provider can only act in the capacity of the seller's agent with respect to the sale of a prepaid contract and documentation of its performance. This is because the seller is the only party authorized by law to sell a prepaid funeral. The commission believes that the seller as principal should exercise appropriate control over its agent by means of a separate agreement that defines a continuing relationship intended to span many individual prepaid contracts.

This comment and similar comments from the insurance industry indicate that insurance-funded permit holders believe they have no control over funeral providers designated in their prepaid funeral contracts. The commission views the problem as not one of legality or permissibility, but rather as a lack of contractual control by a prepaid funeral seller over its chosen agents. As part of the conversion application, new §25.25(c)(5) requires submission of written agreements between the post-conversion permit holder and each person designated as the funeral provider under any prepaid contract to be converted, addressing specified matters. Such agreements need not be limited to the specified matters. Other matters addressed in such an agreement could include handling of money received for a prepaid contract, documentation required with respect to prepaid contracts, rules or procedures for access to computer systems or forms, designation of specific employees permitted to act for the permit holder, required training of employees, and indemnification rights, all typical prudential safeguards that can be appropriately incorporated into a principal/agent relationship. These issues are not addressed in the prepaid funeral contract itself.

The commenter also objects to the standard expressed in §25.25(b)(1)(E), that the proposed post-conversion permit holder must possess the organizational and financial capability necessary to discharge the responsibilities it will be assuming in a conversion. The commenter believes that determinations of organizational and financial capacity would be completely subjective, permitting the department to deny any proposed conversion at will. Further, the commenter questions whether any capital requirement beyond a nominal amount can be justified, because funding is secured by the insurance company and performance remains the obligation of the funeral home. The commission disagrees. As previously described, selling insurance-funded prepaid funeral benefits involves incurring long-term regulatory commitments in exchange for immediate, front-loaded compensation. Permit holders that lack the resources to fulfill their responsibilities in the later years of a contract's existence are at risk of failure. Concerns regarding the financial viability and sustainability of insurance-funded permit holders require consideration of the organizational and financial resources possessed by the proposed post-conversion permit holder or to which it has access. The legislature has delegated discretionary responsibility to the department to determine that the organizational and financial adequacy of an applicant is sufficient to warrant the confidence of the public before the applicant can become a permit holder, see Finance Code, §154.103(b). Further, the reasonableness of a determination by the department in this regard is subject to judicial review. Finally, the department has exercised similar authority in other regulated industries for decades, see, e.g., Finance Code, §§32.003(b), 182.003(b), and 182.008(b).

New §25.25(c)(2)(C)(v) requires the post-conversion permit holder, on a limited basis, to fund undisclosed contracts which were not converted. This provision is included to ensure that the parties to the conversion use due diligence in determining all contracts in existence at the time of the conversion, and to ensure that all similarly situated contracts have the opportunity for conversion. This rule provision reflects what the practice has been for conversions for several years. The commenter opposes the provision because it requires the post-conversion permit holder to assume responsibility for the wrongful acts of the applicant, specifically the failure to document the sale of a prepaid funeral and deposit the consideration received in trust. The commission recognizes that in the case of wrongdoing by

the applicant, the applicant should bear responsibility for funding such contracts, but believes that liability should be contractually addressed in the agreements between the applicant and the post-conversion permit holder. If, for example, the applicant will remain the designated funeral provider under the converted contracts, the agreement required by §25.25(c)(5) or (6) can formalize the funeral provider's obligation to perform such a funeral without compensation or create a specific right of offset against other amounts due to the funeral provider.

The commenter also notes that §25.25(c)(2)(C)(v) imposes a minimum responsibility of $5,000, which could be construed to require $5,000 of funding to correct one omitted contract with a face amount of $2,000. If the intent was to create a minimum threshold for liability, below which no liability exists, the commenter believes the language should be clarified. The commission agrees that clarification is needed. Five percent of the aggregate trust funds transferred in a small conversion could easily be less than the value of one discovered contract, making the obligation meaningless in the event one omitted contract is discovered with a value in excess of the cap of 5.0% of the aggregate trust funds transferred. The subsection has been revised to clarify the amount of maximum responsibility.

New §25.25(c)(3) requires submission of the estimated total commissions and other compensation to be paid by the insurance company in connection with the conversion to each insurance agent that controls, is controlled by, or is under common control with the applicant or a funeral provider under any of the prepaid contracts to be converted. The commenter requests that this provision be deleted as irrelevant and unnecessary to the protection of the purchaser. The commission disagrees and declines to delete this application requirement. The amount of compensation the applicant will realize as a result of conversion is relevant to the department's overall evaluation of the proposed transaction and its proposed distribution of risks and rewards. In addition, the commission notes that this new provision represents a reduction in regulatory burden. Now repealed §25.25(c)(3)(B)(i) and (c)(3)(J) required disclosure in the application of all compensation paid to any party in connection with issuance of the conversion annuities.

New §25.25(c)(5) requires the applicant to submit the written agreement between the post-conversion permit holder and each funeral provider designated under any prepaid contract to be converted. Among other matters, the agreement must obligate the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary. Similarly, if the insurance company is not also the proposed post-conversion permit holder, §25.25(c)(6) requires the applicant to submit a written agreement between the post-conversion permit holder and the insurance company that, among other matters, also obligates the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary. The commenter states that such confidentiality and privacy provisions are unnecessary and superfluous, because trust-funded contract files contain no health information and such information is not required to issue the post-conversion annuities. The commission agrees but declines to delete this requirement. Not all insurance-funded permit holders and insurance companies agree with the commenter. These requirements are intended to address repeated arguments made by several insurance-funded permit holders and insurance companies that regulatory compliance with the recordkeeping requirements of 7 TAC §25.10 is not possible because the parties are prevented by federal law from sharing such information with each other. This concern is addressed by an explicit agreement acknowledging an obligation to protect the privacy of the purchasers.

If the insurance company is not also the proposed post-conversion permit holder, new §25.25(c)(7) requires the insurance company, or its insurance holding company, to commit to the department in writing to take all necessary steps to maintain the existence of the post-conversion permit holder, cause the permit holder to annually renew its permit if renewal is required by Finance Code, §154.107, and provide adequate resources to the post-conversion permit holder to enable it to maintain the financial condition and general fitness necessary to discharge the post-conversion permit holder's responsibilities under Finance Code, Chapter 154. This requirement does not apply if the post-conversion permit holder demonstrates that it independently has the organizational and financial resources to discharge its permit holder responsibilities, and does not intend to rely on the insurance company to provide such resources. The commenter believes this provision is inappropriately broad, in that it would obligate an insurance company or its parent to unconditionally guarantee the existence and financial condition of the permit holder, without the option of securing a successor permit holder in the event the permit holder is no longer viable, which may occur for reasons unrelated to its permit holder activities. The commission agrees and has revised §25.25(c)(7) as adopted to permit an insurance company or its parent to substitute a successor permit holder at its discretion.

New §25.25(c)(10) requires a written summary of the pre-conversion, federal income tax status of the purchasers' trusts as qualified funeral trusts under 16 U.S.C. §685 or grantor trusts. The summary must also include a description of the post-conversion manner in which taxable income arising from the annuities will be reported for federal income tax purposes. The commenter argues that the premise for this requirement, that there is or will be a difference in the amount of taxes paid by the purchaser pre-conversion and post-conversion, is inaccurate. The commenter observes that, under a trust-funded contract, the purchaser will receive a 1099 or K-1 for earnings each year or, if an election under 16 U.S.C. §685 is in effect, the trust will pay the tax liability on behalf of the purchaser annually on a consolidated basis. If the trust pays the tax, the earnings of the trust are reduced by the amount of tax paid, such that each contract account has a pro rata reduction in earnings. In the event of cancellation, the amount a purchaser receives will be net of taxes withheld or, if a §685 election is in effect, there will be no additional tax liability. On the other hand, annuities are tax-deferred investments that are not taxed unless the annuity is cancelled. Upon cancellation of an annuity, the purchaser would be subject to tax on accrued income. In either situation, according to the commenter, the purchaser ultimately pays the tax. For this reason, the commenter asserts that §25.25(c)(10) is unnecessary. The commission declines to delete §25.25(c)(10), in essence a requirement to evaluate and report the potential tax impact of a proposed conversion on the purchasers. If there is no tax impact, the response in the application to §25.25(c)(10) will so indicate.

New §25.25(c)(11) requires submission of information regarding past performance of annuities previously issued by the insurance company that are similar to the form of annuity to be issued in the proposed conversion. The commenter believes this requirement is unnecessary and irrelevant because two percent annual growth on the conversion annuities must be guaranteed pursuant to §25.25(c)(9)(A). The commission declines to delete the requirement. Although the annuities issued in a conversion must guarantee two percent annual growth, actual growth paid

on similar annuities issued in the past may reveal previously undiscovered contract limitations or financial difficulties that indicate a need for a more thorough evaluation of the insurance company or the proposed form of annuity.

Provisions governing the proposed newspaper notice and proposed notification letters to be sent to purchasers are contained in §25.25(c)(15). Because the notification letter from the applicant is a key statutory predicate to conversion under Finance Code, §154.204(b), the proposed version of §25.25(c)(15) would require "full and fair disclosure of all material information necessary for the purchaser to make an informed decision." In general, the commenter recommends revisions to simply require a brief and fair disclosure, made in a manner that would not be confusing to the purchaser. In general, the commission agrees and has revised §25.25(c)(15)(A) accordingly. Comments regarding specific components of proposed §25.25(c)(15) and the commission's responses to those comments are addressed in the following paragraphs.

The commenter is critical of the requirement to include a preprinted declination form with the notification letter to purchasers, proposed as §25.25(c)(15)(A)(iii), and argues that inclusion of such a form would serve only to encourage purchasers to opt out and is unnecessary for purchasers to exercise their right to opt out of the conversion. The commission agrees and has deleted the provision. As an alternative to this declination form, a requirement for conspicuous disclosure of the purchaser's right to decline the conversion has been added to adopted §25.25(c)(15)(B).

The proposed rule included, in §25.25(c)(15)(A)(iv), a requirement that the notification letter must inform the purchaser that a copy of the specifications page of the funding annuity is available upon request. One commenter expresses the belief that this statement would more appropriately be contained in the letter from the insurance company rather than in the letter from the applicant. The commenter requests that the rule be revised to provide that this statement must appear in one of the notification letters to the purchasers but is not specifically required to appear in the letter from the applicant. The rule as proposed treats the notification letter from the applicant as the notice in writing of the terms of the proposed conversion and the purchaser's right to decline the conversion that is specifically required by Finance Code, §154.204(b). However, the commission believes the notification letter from the insurance company can contain a complete statement regarding how to obtain a copy of the specifications page of the annuity, and the required statement in the notification letter from the applicant can be drafted to refer to the insurance company as the source of the specifications page. Therefore, language has been added to adopted §25.25(c)(15)(C) to clarify that this notification of availability of the annuity specifications page can be provided by the insurance company.

As proposed, §25.25(c)(15)(A)(v) required a statement that questions or complaints regarding the prepaid contract or the proposed conversion may be directed to the department. The commenter requests that the provision be amended to include, at a minimum, the applicant and the post-conversion permit holder as additional points of contact for questions relating to the proposed conversion. The commission declines to revise the requirement, adopted as §25.25(c)(15)(D), but observes that the rule would not prohibit the voluntary inclusion of additional contacts if the addition does not obscure or minimize the required content.

The prepaid funeral guaranty fund, Finance Code, §154.351, was established to guarantee performance of the obligations of sellers to purchasers of trust-funded contracts. As implemented by 7 TAC §§25.17 - 25.20, the guaranty fund finds a successor funeral provider if a trust-funded permit holder is unable to fulfill its prepaid contracts. In appropriate cases, the guaranty fund may pay a funeral provider an additional amount in excess of the trust funds underlying the prepaid contracts in exchange for honoring the contracts as originally written, with no extra charges to the purchasers. This guarantee of contract performance does not apply to insurance-funded contracts and, as proposed, §25.25(c)(15)(B)(i) required disclosure of this lapse in coverage.

Although payment of an annuity issued in a conversion is guaranteed by an insurance guaranty fund (the Texas Life, Accident, Health, and Hospital Service Insurance Guaranty Association) under the provisions of Insurance Code, Chapter 463, the seller's performance of the contract is not guaranteed by the insurance guaranty fund. Therefore, if the designated funeral provider in a converted contract should cease to do business for any reason after conversion but before performance of the contract, neither the post-conversion permit holder, the insurance company, nor the insurance guaranty fund will be legally obligated to find a substitute funeral provider. The purchaser will ultimately be responsible for establishing a new prepaid contract with another funeral provider and arranging for the annuity proceeds to be paid to the new funeral provider. Further, the new funeral provider would not be obligated to provide the previously selected funeral services and merchandise for the same price that was specified in the original prepaid contract. This scenario illustrates the distinction between guaranteed "payment" of the annuity underlying an insurance-funded contract and guaranteed "performance" of a trust-funded contract and, as proposed, §25.25(c)(15)(B)(i) also required disclosure of this distinction. However, the proposed disclosure did not specifically mention the insurance guaranty fund.

Two commenters argue that disclosing the loss of prepaid funeral guaranty fund coverage would be misleading if the coverage of the annuity by the insurance guaranty fund is not disclosed. One of the commenters requested that the provision be amended to permit mentioning insurance guaranty fund coverage. The commenter also observed that mentioning insurance guaranty fund coverage could be construed as using the existence or function of the guaranty fund in advertising or marketing to sell, solicit, or induce the purchase of insurance, a practice prohibited by Insurance Code, §463.451. If mentioning insurance guaranty fund coverage will be permitted, the commenter requested that the provision be further amended to explicitly provide that the disclosure in the notification letter is not an act contemplated by or a violation of Insurance Code, §463.451. Although the commission notes that the proposed rule required certain disclosures but did not prohibit other disclosures, the commission understands the concern and agrees to make revisions. The revised requirement to disclose the change of guaranty fund coverage and the effect of such change now appears as adopted §25.25(c)(15)(E).

In addition, one commenter argues that the required illustration of the distinction between guaranteed performance and guaranteed payment may be theoretically accurate but is actually misleading because funeral providers throughout Texas routinely advertise that they will gladly service any prepaid contract of a competing funeral provider on the same terms and conditions. The commission in response has simplified and shortened this part of the required disclosure in adopted §25.25(c)(15)(E) to in-

form the contract purchaser of the possibility that a successor funeral provider may not agree to provide the previously selected funeral services and merchandise for the same price specified in the prepaid contract with the original funeral provider.

The commenter further contends that fairness would demand disclosure of a number of possible but unlikely negative scenarios relating to trust-funded contracts, in order to counterbalance the required description of an unlikely scenario involving insurance-funded contracts. The commission responds that responsibility for making a fair disclosure of the terms of conversion ultimately belongs to the applicant for conversion. Adopted §25.25(c)(15) specifies certain required disclosures but does not prohibit other disclosures that the applicant considers to be material and necessary to best prepare the purchaser to make an informed decision regarding the conversion.

Proposed §25.25(c)(15)(B)(ii) was intended to discourage the use of puffery in the notification letter, a practice that had become increasingly common over the last several years, e.g., "this is a great deal for you." Proposed §25.25(c)(15)(B)(ii) would have required disclosure of the estimated compensation to be paid in connection with the conversion to all persons affiliated with the applicant or with a funeral provider designated in any of the prepaid contracts proposed to be converted, in a situation where the notification letter contained promotional statements or claims that express subjective rather than objective views of the merits or benefits of conversion. No such disclosure would have been required in a situation where the notification letter contained only objective information. One commenter was critical of this technique for discouraging promotional claims, pointing out that what constitutes a subjective versus an objective statement can itself be a highly subjective determination. The commenter suggests that factual statements should not be limited, but that the department already possesses ample authority to prohibit untruthful statements. The commission agrees and has revised the provision to contain a direct prohibition. The department will exercise its discretion to determine what constitutes an inappropriate promotional statement or claim that expresses subjective rather than objective views of the merits or benefits of conversion. As revised, the provision appears as adopted §25.25(c)(15)(F).

In general, an insurance policy funding a prepaid contract will insure the life of the person intended to receive the funeral, the contract beneficiary. In such a case, the designation of the insured as the contract beneficiary under the prepaid contract could not be changed without fully unwinding the arrangement. However, trust-funded contracts typically allow the contract beneficiary to be changed. Accordingly, proposed §25.25(c)(15)(B)(iii) provided that, if the prepaid contract allowed the contract beneficiary to be changed, the notification letter must advise the purchaser that the prepaid contract beneficiary could no longer be changed after the funding annuity is issued. One commenter classifies as erroneous the assumption that a post-conversion annuity would not allow the designated annuitant (the insured) to be changed when in fact such a change can be possible if the annuity so provides. The commenter urges that this disclosure be deleted from the notification letter and that the rule be amended to require that the post-conversion annuity, either expressly or through a rider, allow for a change in annuitant if the underlying prepaid contract permits the contract beneficiary to be changed. The commission agrees that the disclosure as proposed rests upon an erroneous assumption, and has revised the provision, now located in adopted §25.25(c)(15)(G), to require the disclosure only if the prepaid contract allows the contract beneficiary to be changed and the annuity contract does not allow the annuitant to be changed.

Proposed §25.25(c)(15)(B)(iv) would require the notification letter to explain the anticipated change in tax treatment if the conversion has potential tax implications for the purchaser. The proposed text was premised upon a situation presumed to commonly occur. One commenter described the provision as inaccurate, misleading, and a fundamental misrepresentation of the meaning of 16 U.S.C. §685 and trust taxation. As an alternative, the commenter suggests that the provision simply require the notification letter to explain any change in federal income taxation resulting from the conversion that is anticipated to affect the purchaser. The commission agrees and has revised the subsection as comment suggests.

New §25.25 is adopted pursuant to Finance Code, §154.204, which provides for department approval of a conversion from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits to safeguard the rights and interests of the individual who purchases a prepaid funeral benefits contract, and pursuant to Finance Code, §154.051, which authorizes the commission to adopt rules relating to the enforcement and administration of Chapter 154.

§25.25. Conversion from Trust-Funded to Insurance-Funded Benefits.

(a) Definitions. Definitions of words and terms in Finance Code, §154.002, are incorporated in this section by reference. The following words and terms have the following meanings when used in this section, unless the context clearly indicates otherwise.

(1) Aggregate trust funds--The trust funds to be transferred with respect to an individual prepaid contract as of the transfer date, comprised of the paid-in principal plus the earnings attributable to that prepaid contract. As the context may require, the term also refers to the sum of the aggregate trust funds for all prepaid contracts subject to conversion.

(2) Applicant--A permit holder under Finance Code, Chapter 154, who files an application under this section.

(3) Contract beneficiary--The person named in a prepaid contract as the intended recipient of contracted funeral merchandise and services.

(4) Conversion--A transaction under Finance Code, §154.204, and this section, to convert all outstanding trust-funded prepaid funeral benefits under existing prepaid contracts administered by the applicant to insurance-funded prepaid funeral benefits to be administered by the post-conversion permit holder after conversion.

(5) Insurance company--The insurance company designated in an application filed under this section to issue the annuities required for the conversion. The insurance company may also be the post-conversion permit holder if permitted under applicable insurance law and regulations.

(6) Paid-in principal--The amount required to be deposited in trust by the applicant with respect to an individual prepaid contract pursuant to Finance Code, §154.253. As the context requires, the term may also refer to the total amount deposited in trust by the applicant for all prepaid contracts.

(7) Post-conversion permit holder--The permit holder designated in an application filed under this section to hold and administer the prepaid contracts after conversion. The post-conversion permit holder may also be the insurance company if permitted under applicable insurance law and regulations.

(8) Prepaid contract--A contract for prepaid funeral benefits under Finance Code, Chapter 154.

(9) Purchaser--An individual who purchased a trust-funded prepaid contract that is the subject of an application filed under this section. The purchaser may also be the contract beneficiary. If permitted by the context, the term includes the purchaser's authorized agent.

(10) TDI--Texas Department of Insurance.

(11) Unpaid principal balance--The unpaid portion of the purchase price of a prepaid contract.

(b) Standards for approval and eligibility. The department will not approve a proposed conversion unless the following general requirements have been met.

(1) Standards for approval. The proposed insurance-funded benefits arrangement must safeguard the rights and interests of the purchasers to substantially the same degree as the trust-funded benefits arrangement sought to be replaced, as provided by Finance Code, §154.204, and this section. An application may be approved or denied without the necessity of a hearing, subject to the right of the applicant or the post-conversion permit holder to request a hearing. Without limiting its ability to consider any matter relevant to the determination of substantial equivalency, the department will not approve a proposed conversion unless:

(A) the form(s) of insurance policy proposed for use in the conversion is a single or flexible premium deferred fixed (not variable) annuity that is structured to protect and preserve the existing rights and interests of the purchaser, including the amount of funds the purchaser would be entitled to receive upon cancellation of the prepaid contract and the amount of funds payable upon maturity of the prepaid contract;

(B) the post-conversion permit holder directly or indirectly controls, is controlled by, or is under common control with the insurance company;

(C) neither the applicant nor the post-conversion permit holder have a record of noncompliance with respect to the requirements of Finance Code, Chapter 154, and this chapter, as evidenced by paragraph (2) of this subsection;

(D) the post-conversion permit holder accepts responsibility for verifying that the prepaid contracts proposed for conversion are performed in accordance with their terms, and undertakes to maintain the records the department requires to determine compliance with Finance Code, Chapter 154, and this chapter; and

(E) the post-conversion permit holder demonstrates the organizational and financial capability to discharge its accepted responsibilities.

(2) Eligibility. At the time the application is filed, processed and approved, the applicant and the post-conversion permit holder must each be in good standing with the department. To be in good standing with the department, the department's most recent report of examination of either permit holder must not cite any violation of applicable laws and regulations or other material deficiencies that have not been remedied or corrected to the satisfaction of the department, and the permit holder must not be delinquent with respect to any fees or filings due to the department. Within 45 days after an application for conversion is filed with the department, the department may conduct an examination of the applicant or the post-conversion permit holder or both before approving or denying the application if an examination has not been conducted within the preceding 12 months or for the purpose of verifying that previously cited violations or other deficiencies have been satisfactorily eliminated or corrected.

(c) Contents of application. An application for conversion must respond to each paragraph of this subsection by number. Overlapping or duplicate responses may be cross-referenced for brevity.

(1) Letter requesting conversion. The applicant shall submit a letter to the commissioner, signed by a duly authorized officer, that:

(A) requests approval of the conversion of the applicant's prepaid contracts;

(B) requests authorization to transfer the applicant's responsibility for the prepaid contracts to the post-conversion permit holder;

(C) summarizes the amount of aggregate trust funds by depository and account number and the component amounts of paid-in principal and earnings, and requests authorization to transfer the aggregate trust funds from the currently approved depository or trustee to the insurance company;

(D) represents that the applicant is in compliance with Finance Code, §154.301, regarding prepaid contracts presumed to be abandoned, and has filed the reports and delivered funds as required by Finance Code, §154.304; and

(E) if the applicant is not an individual, includes a certified resolution of the applicant's board authorizing the conversion, the application, and the execution of related documents by the submitting officer.

(2) Agreement regarding conversion. The applicant must submit an original, signed copy of the agreement among the applicant, the post-conversion permit holder, and the insurance company regarding the transfer, receipt, and application of trust funds upon conversion that, among other matters, contains the following provisions:

(A) agreement of the parties that all prepaid contracts of the applicant in existence as of the date of the application will be subject to conversion, excluding prepaid contracts that are presumed abandoned under Finance Code, §154.301;

(B) agreement of the insurance company that:

(i) the formula for determining the cash surrender value or cancellation benefit of each annuity to be issued in the conversion will be at least as generous to the purchaser as the formula that would have applied under Finance Code, §154.155, had the prepaid contract not been converted from trust-funded to insurance-funded;

(ii) the face amount of the annuity to be issued with respect to each prepaid contract will not be less than the amount of aggregate trust funds transferred for that prepaid contract;

(iii) for any prepaid contract which is not fully paid and the balance due not included in the annuity described in clause (ii) of this subparagraph, the face amount of the supplemental annuity to be issued may not be less than the unpaid principal balance, and no credit or reduction will be applied to the unpaid principal balance for earnings attributable to paid-in principal under the prepaid contract;

(iv) upon request, a copy of the specifications page of the funding annuity or annuities will be furnished to the purchaser of the prepaid contract to be funded; and

(v) no commissions or other compensation will be paid out of or deducted from the aggregate trust funds to be transferred in the proposed conversion.

(C) agreement of the post-conversion permit holder with respect to the converted prepaid contracts to:

(i) maintain all records required by §25.10 of this title (relating to Recordkeeping Requirements for Insurance-Funded Contracts);

(ii) verify that each death or cancellation benefit claim under a converted prepaid contract is paid in accordance with Finance Code, Chapter 154, and this chapter;

(iii) verify that each prepaid contract is performed by the funeral provider at maturity in accordance with its terms;

(iv) verify that any additional charges imposed by the funeral provider and collected from the decedent's representatives are for additional services or merchandise not otherwise contemplated by and funded under the prepaid contract and, if not, promptly refund or require the funeral provider to refund any prepaid contract overcharges to the decedent's representatives; and

(v) if within the five-year period following approval of the conversion a purchaser presents a fully executed prepaid contract that was not listed in the applicant's pre-conversion or post-conversion summaries and provides proof of payments made on the contract, take action to cause the insurance company to issue one or more annuities with respect to the previously omitted prepaid contract as if it had originally been included in the conversion or, if cancellation is requested by the purchaser, pay or take action to cause the purchaser to be paid the cancellation benefit due. The maximum potential responsibility imposed by this clause is 5.0% of the aggregate trust funds transferred, except that if 5.0% of the aggregate trust funds is:

(I) less than $5000, the maximum potential responsibility imposed by this clause is $5,000;

(II) greater than $20,000, the maximum potential responsibility imposed by this clause is $20,000.

(3) Compensation to insiders. The applicant must submit a written disclosure of the estimated total commissions and other compensation to be paid by the insurance company in connection with the conversion to each insurance agent that controls, is controlled by, or is under common control with the applicant or a funeral provider under any of the prepaid contracts to be converted, expressed as a percentage, dollar amount, or both, and the identity of each such agent.

(4) Agreement of post-conversion permit holder and applicant. The applicant must submit a written agreement between the post-conversion permit holder and the applicant that, at a minimum, requires the applicant to relinquish the individual prepaid contract ledgers formerly maintained by the applicant under §25.11 of this title (relating to Record Keeping Requirements for Trust-Funded Contracts) and obligates the post-conversion permit holder to maintain such ledgers to reflect the paid-in principal and the unpaid principal balance under each converted prepaid contract.

(5) Agreements between post-conversion permit holder and funeral providers. The applicant must submit the written agreement between the post-conversion permit holder and each person designated as the funeral provider under any prepaid contract to be converted that, at a minimum:

(A) sets forth the nature and scope of the relationship between the permit holder and the funeral provider and the respective rights and responsibilities of the parties with respect to the prepaid contracts of that funeral provider, including allocation of responsibilities for refunding any prepaid contract overcharges identified by the permit holder or the department;

(B) requires the funeral provider to perform and deliver the funeral benefits under each converted prepaid contract of that funeral provider in accordance with its terms;

(C) requires the funeral provider to provide the post-conversion permit holder with the documentation necessary to enable the permit holder to maintain the records required by Finance Code, Chapter 154, and §25.10 of this title; and

(D) obligates the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary under the prepaid contract in compliance with applicable law.

(6) Agreement of post-conversion permit holder and insurance company. If the proposed post-conversion permit holder is not the insurance company, the applicant must submit a written agreement between the post-conversion permit holder and the insurance company that, at a minimum, requires the insurance company to provide the post-conversion permit holder with the documentation necessary to enable the permit holder to maintain the records required by §25.10 of this title. The agreement must also obligate the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary under each converted prepaid contract and the owner and insured under each annuity issued in the proposed conversion in compliance with applicable law.

(7) Commitment of insurance company. If the post-conversion permit holder is not the insurance company and is unable to independently demonstrate that it has the organizational and financial resources to discharge its permit holder responsibilities, or otherwise intends to rely on the insurance company to provide such resources, the insurance company or its insurance holding company must commit to the department in writing to take all necessary steps to maintain the existence of the current or a successor post-conversion permit holder, cause such permit holder to annually renew its permit if renewal is required by Finance Code, §154.107, and provide adequate resources to such post-conversion permit holder to enable it to maintain the financial condition and general fitness necessary to discharge the post-conversion permit holder's responsibilities under Finance Code, Chapter 154, and this chapter.

(8) Commitment of applicant. The applicant must commit to the department in writing to obtain and annually renew a permit under Chapter 154 and assume the post-conversion permit holder's responsibilities with respect to each converted contract for any year in which any converted contract remains outstanding and the post-conversion permit holder or a duly licensed successor fails to renew its permit as required with respect to the converted contracts, as evidenced by a final order revoking the permit. The commitment must obligate the applicant to submit its completed application with all required fees not later than the 31st day after the date the department notifies the applicant in writing of the facts that require licensure under the commitment.

(9) Form of annuity. The applicant must submit a copy of the form(s) of annuity proposed to be issued as part of the conversion. The submitted form(s) must be accompanied by a copy of the TDI notice of action approval letter. The applicant and not TDI is responsible for ensuring that the form of annuity complies with this section. Among other matters, the annuity must:

(A) provide guaranteed growth of the death benefit of no less than 2.0% compounded annually on gross premiums paid beginning in the first year of the policy;

(B) provide a formula for determining cash surrender value or cancellation benefit that will be at least as generous to the purchaser as the formula that would have applied under Finance Code, §154.155, had the prepaid contract not been converted from trust-funded to insurance-funded;

(C) provide a death benefit for the duration of the prepaid contract that equals the sum of the aggregate trust funds trans-

ferred at conversion, all future premiums paid, and accumulated growth thereon as provided by subparagraph (A) of this paragraph, provided that the death benefit can never be less than the amount that would have been available under the prepaid contract on the date of conversion had the prepaid contract not been converted from trust-funded to insurance-funded; and

(D) not include any provision that allows for contesting coverage or limiting death benefits, refers to or requires a physical examination, or otherwise operates as an exclusion, limitation, or condition on payment of death benefits other than provisions requiring submission of proof of death or surrender of the annuity at the time the annuity matures or is canceled.

(10) Federal income tax treatment. The applicant must submit a written summary describing the pre-conversion, federal income tax status of the purchasers' trusts, in the aggregate, as either qualified funeral trusts under 16 U.S.C. §685 or grantor trusts, for the preceding taxable year. Disclosure of differing treatment of individual purchaser trusts is not required if the summary identifies and quantifies the percentage of purchaser trusts treated as grantor trusts and qualified funeral trusts. The applicant must also describe the post-conversion manner in which taxable income arising from the annuities will be reported for federal income tax purposes, including taxable income arising from payment of cash surrender value.

(11) Past performance. The applicant must submit an historical yield table or graph reflecting the annual rate of growth in the death benefit under previously issued annuities similar to the form of annuity proposed to be issued by the insurance company in the proposed conversion, expressed as a percentage for each year of the most recent five-year period, to the extent such annuities were in existence in those periods. For purposes of this paragraph, the annual growth under the annuity equals the growth rate credited by the insurance company to the death benefit for the year.

(12) Form of assignment. The applicant must submit a copy of the form of assignment, if any, to be used in assigning annuity rights or proceeds to the post-conversion permit holder.

(13) Qualifications of post-conversion permit holder. With respect to the post-conversion permit holder, the applicant must submit:

(A) if the proposed post-conversion permit holder is not also the insurance company, a copy of the post-conversion permit holder's most recent annual financial statements and the most current year-to-date financial statements;

(B) a list of all previous conversions in this state accepted by the post-conversion permit holder and, with respect to each conversion, the date of the order approving the conversion and the date that the converted prepaid contracts were formally transferred to the post-conversion permit holder;

(C) a summary of the number and aggregate purchase price of all prepaid contracts administered by the post-conversion permit holder as of the end of the immediately preceding calendar year;

(D) a description of how the prepaid contracts to be converted will be administered by the post-conversion permit holder, including a description of activities or functions, other than delivery of funeral services and merchandise by the designated funeral provider, that will be outsourced and the contractor that will perform such activities or functions; and

(E) if any contractor named in response to subparagraph (D) of this paragraph directly or indirectly controls, is controlled by, or is under common control with the post-conversion permit holder, a summary of the contracting relationship for each of the preceding three fiscal years that includes a description of the services performed and the compensation paid by the post-conversion permit holder.

(14) Qualifications of insurance company. With respect to the insurance company, the applicant must submit:

(A) a letter from the insurance company addressed to the department, dated not more than 60 days prior to the date the application is filed, representing that the insurance company is in good standing and currently authorized to conduct the business of insurance in this state;

(B) to the extent available, a list of the current financial strength ratings of the insurance company determined by A.M. Best Company, Standard & Poor's, Wiess Research, Duff & Phelps, and Moody's Investors Service; and

(C) a list of all previous conversions in this state that were funded by the insurance company and, with respect to each conversion, the date of the order approving the conversion and the date that trust funds were formally transferred to the insurance company.

(15) Notice to purchasers. The applicant must submit the proposed form of public notice required by subsection (e)(2) of this section and each proposed letter regarding the proposed conversion to be sent to purchasers from the applicant, the post-conversion permit holder, or the insurance company, for approval by the department. The proposed form of notification letter from the applicant must:

(A) briefly and fairly disclose the terms of the proposed conversion in a manner that is not misleading and that enables the purchaser to understand the terms of the proposed conversion and the impact on the purchaser and the purchaser's contract;

(B) conspicuously disclose, by means of bolded type within a bordered text box or another method acceptable to the department, the purchaser's right under Finance Code, §154.204(b), to decline the conversion and remain in the existing trust-funded funeral benefit arrangement by filing a written request with the department within 60 days;

(C) inform the purchaser that a copy of the specifications page of the funding annuity is available upon request, if such notice is not contemporaneously provided by the insurance company in a separate letter;

(D) advise the purchaser that questions or complaints regarding the prepaid contract or the proposed conversion may be directed to the Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705; 1-877-276-5554 (toll free);

(E) disclose that the prepaid funeral guaranty fund will no longer guarantee performance of the prepaid contract after conversion, that a successor funeral provider may not agree to provide the previously selected funeral services and merchandise for the same price specified in the prepaid contract with the original funeral provider, and at the option of the applicant, disclose as an aid for comparison that payment of the funding annuity, but not performance of the contract itself, will be guaranteed by the Texas Life, Accident, Health, and Hospital Service Insurance Guaranty Association after conversion (provided that, if approved by the department, such disclosure will not be deemed a violation of Insurance Code, §463.451);

(F) not contain promotional statements or claims that express subjective rather than objective views of the merits or benefits of conversion;

(G) if the prepaid contract allows the contract beneficiary to be changed and the annuity contract does not allow the annu-

itant to be changed, disclose that the prepaid contract beneficiary may no longer be changed after the funding annuity is issued; and

(H) explain any change in federal income taxation related to cancellation and maturity resulting from the conversion that is anticipated to affect the purchaser.

(16) Pre-conversion summary. The applicant must submit a pre-conversion summary pertaining to each prepaid contract to be converted, determined as of a date no earlier than 30 days prior to the date the application is filed, with totals for all prepaid contracts to be converted, if applicable, addressing each of the following categories:

(A) name and, if available, date of birth of the purchaser;

(B) date of contract;

(C) contract purchase price;

(D) paid-in principal;

(E) unpaid principal balance, if any;

(F) accumulated earnings;

(G) cancellation benefit due to the purchaser, assuming cancellation were to occur on the calculation date;

(H) amount eligible to be withdrawn from the trust fund by the applicant upon death of the contract beneficiary, assuming death were to occur on the calculation date; and

(I) amount retained by the applicant under Finance Code, §154.252.

(17) Pro forma post-conversion summary. The applicant must submit a pro forma post-conversion summary pertaining to each prepaid contract as if converted, determined as of the same date as the pre-conversion summary, with totals for all prepaid contracts, if applicable, addressing each of the following categories:

(A) name of annuitant;

(B) contract purchase price;

(C) paid-in principal;

(D) unpaid principal balance, if any;

(E) the amount of transferred trust funds applied to the premium for the annuity;

(F) amount retained by the applicant under Finance Code, §154.252;

(G) cash surrender value of each annuity, assuming the annuity were to be surrendered on the calculation date; and

(H) death benefit under each annuity, assuming death were to occur on the calculation date.

(18) Voluntary cancellation of permit. If the applicant will not sell trust-funded prepaid contracts or administer previously sold trust-funded prepaid contracts after the conversion, the applicant must submit a completed form to voluntarily cancel its trust-funded permit. The applicant's voluntary cancellation will not be processed unless the conversion is approved, and will not be effective until the department completes the close-out examination of the applicant.

(19) Application fee. In connection with an application submitted under this section, the applicant must submit the conversion application fee required by §25.23 of this title (relating to Application Fees).

(20) Side agreements. To the extent not otherwise required by this subsection, the applicant must submit copies of any other agreements between or among the applicant, a funeral provider, the post-conversion permit holder, and/or the insurance company that contain contractual provisions or informal understandings or undertakings addressing any aspect of the proposed conversion or the future relationship among the applicant, a funeral provider, the post-conversion permit holder, and/or the insurance company with respect to any converted prepaid contract.

(d) Consideration of application; hearing. If the application is deficient, the department may require any person connected with the proposed conversion to submit additional information. An application may be approved or denied without the necessity of a hearing, subject to the right of the applicant or the post-conversion permit holder to request a hearing.

(1) Conditions in order approving conversion. An order approving conversion will impose certain conditions that are not subject to objection, as described in subsection (e) of this section. The order may also impose other, nonstandard conditions specific to the conversion at issue. The applicant or the post-conversion permit holder must submit a written request for hearing pursuant to paragraph (2) of this subsection if any nonstandard condition in the order is objectionable, in which case the order is deemed to be a denial. Consummation of the conversion transaction constitutes confirmation of acceptance by the applicant, the post-conversion permit holder, and the insurance company of any conditions imposed by the order and is considered for all purposes an agreement with the department enforceable against the applicant, the post-conversion permit holder, and the insurance company.

(2) Hearing. The applicant or the post-conversion permit holder may file a written request for hearing with the commissioner on or before the 30th day after the date of the order denying the application, or an order imposing nonstandard conditions objectionable to the applicant or the post-conversion permit holder, stating with specificity the reasons the applicant alleges that the decision of the department is in error. The request for hearing will be forwarded to the administrative law judge who must enter appropriate orders and conduct the hearing on or before the 60th day after the date the request for hearing was received, or as soon as is otherwise reasonably possible, under Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings) and Government Code, Chapter 2001. The applicant or the post-conversion permit holder has the burden of proof to demonstrate that the proposed insurance-funded prepaid funeral benefits safeguards the rights and interests of each affected purchaser to substantially the same degree as the existing trust-funded prepaid funeral benefits sought to be replaced. A denial of an application may not be appealed until a final order is issued.

(e) Standard conditions in order approving conversion. An order approving conversion will impose six required conditions that are not subject to objection. Failure to satisfy any of these conditions constitutes a violation of an order of the commissioner subject to possible enforcement action under Finance Code, Chapter 154.

(1) The order approving conversion will prohibit issuance of the annuities prior to the expiration of the time period for a purchaser to decline conversion, including any extended time period required by paragraph (4) of this subsection, except that the annuities may be issued prior to that date if expiration of the time period will occur during the free look period or if a purchaser electing to decline conversion will not be required to pay an early withdrawal penalty for cancellation of the annuity.

(2) Pursuant to Finance Code, §154.204(b), the order approving conversion will require the applicant to notify purchasers of the proposed conversion by the following means:

(A) The notification letter from the applicant described by subsection (c)(15) of this section must be sent to purchasers by certified mail or another form of mail that requires or provides proof of delivery to the last known address of the purchaser.

(B) The applicant must publish a one-time public notice in a newspaper of general circulation in the county in which the applicant is located, or in another publication or location as directed by the department, as evidenced by a publisher's affidavit attesting to the date of publication, advising purchasers of trust-funded prepaid contracts from applicant of the pending conversion, the right of a purchaser to decline conversion, and the manner in which a purchaser may obtain more information about the purchaser's rights and options regarding the conversion.

(3) The order approving conversion will provide that a prepaid contract for which the notification letter is returned unclaimed may not be converted to the insurance-funded funeral benefit arrangement approved in the order unless the requirements of this paragraph are met.

(A) With respect to each notification letter returned unclaimed because the address is incorrect, the addressee is unknown or has moved without leaving a forwarding address, or the addressee's forwarding order has expired, the applicant must search for a new address for the purchaser using available non-fee based resources. If a new address is located, the applicant must resend the notification letter one time in the manner required by subsection (e)(2)(A) of this section.

(B) With respect to each unclaimed notification letter for which a new address is not located and with respect to each remailed notification letter that is returned unclaimed, the applicant must review the related contract file in light of the returned letter to verify or change its prior determination that the contract should not be presumed abandoned under Finance Code, §154.301, and must retain documentation evidencing its review for examination by the department. A prepaid contract subject to this paragraph may be converted to the insurance-funded funeral benefit arrangement approved in the order only if the applicant makes a new affirmative finding that the contract should not be presumed abandoned. On or before the 120th day after the date of the order, the applicant must submit a report to the department summarizing its activities under this subparagraph and reporting the basis for findings made.

(4) The order approving conversion will require the post-conversion permit holder, on or before the 120th day after the date of the order, to submit to the department a notarized statement attesting that the annuities have been issued and funded on behalf of the purchasers listed in the pro forma post-conversion summary included in the conversion application and disclosing the date that the notification letters included in the conversion application were mailed to the purchasers.

(5) The order approving conversion will require the post-conversion permit holder, on or before the 120th day after the date the trust funds are transferred as authorized by the order, to submit to the department a final post-conversion summary pertaining to each converted prepaid contract, determined as of the conversion date, with totals for all prepaid contracts, if applicable, addressing each of the following categories:

(A) name of annuitant;

(B) policy number of the annuity issued to the annuitant, or of each annuity if a supplemental annuity is also issued;

(C) contract purchase price;

(D) paid-in principal;

(E) unpaid principal balance, if any;

(F) the amount of transferred trust funds applied to the premium for each annuity;

(G) amount retained by the applicant under Finance Code, §154.252;

(H) cash surrender value of each annuity, assuming the annuity were to be surrendered on the conversion date; and

(I) death benefit under each annuity, assuming death were to occur on the conversion date.

(6) The order approving conversion will require the conversion transaction to be fully implemented and completed on or before the 150th day after the date of the conversion order.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2008.

TRD-200806647
A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts new §25.217, relating to Distributed Renewable Generation (DRG), and an amendment to §25.242, relating to Arrangements between Qualifying Facilities and Electric Utilities with changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4771). Project Number 34890 is assigned to this proceeding.

The new §25.217 addresses interconnection, renewable energy credits, and the sale of out-flows for distributed renewable generation. The amendment to §25.242 establishes metering requirements for DRG. The rules are competition rules subject to judicial review as specified in PURA §39.001(e).

A public hearing was held on August 5, 2008, in which comments were received from Texas Energy Efficiency Partnership (TEEP), Public Citizen, and the Sierra Club. The commission also received written comments from: James and Annette Herrington; the Solar Alliance (Solar Alliance); the Texas Renewable Energy Industries Association (TREIA); the Texas Solar Energy In-

dustries Association (TXSEIA); TXU Energy (TXU); the Alliance for Retail Markets (ARM); Henry B. Williams; Jeff and Donna Beaver; Reliant Energy (Reliant); HelioVolt; Oncor Electric Delivery Company (Oncor); Southwestern Electric Power Company, AEP Texas North Company, and AEP Texas Central Company (collectively, AEP); Public Citizen, Environmental Defense Fund, Sustainable Energy & Economic Development Coalition, Environment Texas, and Texas Impact (collectively, Public Citizen); David Smith; El Paso Electric Company (EPE); SunPower; and the Electric Reliability Council of Texas (ERCOT).

Preamble Question

In its Proposal for Publication, the commission asked those commenting to answer the following question:

Should existing qualifying facilities operating under §25.242(h)(4) in areas of the state in which customer choice has not been introduced be allowed to continue to do so?

While making different supporting arguments, TREIA, TXSEIA, Jeff and Donna Beaver, HelioVolt, Public Citizen, and SunPower all supported allowing existing qualifying facilities (QFs) to continue operating under §25.242(h)(4) in areas of the state in which customer choice has not been introduced to continue to do so. This provision gives the owner of a QF with a design capacity of 50 kilowatts (kW) or less the option of interconnecting through a single meter that runs forward and backward and provides standards for the purchase of any net production from such a facility. TREIA and TXSEIA stated that the Legislature's intent on this issue is not clear, that traditional net metering does not conflict with the market design outside of ERCOT, and that House Bill (HB) 3693 does not require any net metering agreements outside of ERCOT to be overridden by a new net metering regime designed for competitive markets. The Beavers stated that owners of renewable generation should be allowed to continue to have whatever arrangement they currently have. HelioVolt stated that the commission should use §25.242(h)(4) as a guide for net metering in all of Texas. Public Citizen stated that changing §25.242(h)(4) will expose owners of distributed renewable generation who have already made significant up-front capital investments to very real potential for financial harm. Public Citizen stated at the workshop that Ercie and Eddie Hill of Burkburnett, Texas are purchasing a 30 kW wind turbine from Wind Eagle Corporation and are "devastated that net metering is going away." SunPower urged the commission to permit such parties to renew existing agreements and to continue to use their existing meters as long as they wish.

In contrast, EPE stated that allowing existing QFs operating under §25.242(h)(4) in areas of the state in which customer choice has not been introduced to continue to do so is contrary to the plain language of HB 3693. EPE stated that HB 3693 applies to all electric utilities and transmission and distribution utilities, with no words of limitation with respect to whether or not the utility is in ERCOT or an area of the state not subject to retail competition. EPE also stated that the Legislature limited the sale of electricity by owners of distributed renewable generation in areas of the state where customer choice has been implemented, which indicates that if it had intended to limit its metering requirements it would have done so.

AEP stated that existing QFs operating under §25.242(h)(4) in areas of the state in which customer choice has not been introduced should be allowed to continue to do so, until such time as the existing agreements expire or equipment at the premises is replaced or removed. TXEIA and TXSEIA requested that the commission clarify the limitations recommended by SWEPCO before adopting this recommendation.

Commission Response

In adopting §25.213 in the current project, the commission concluded that the use of a single meter that runs forward and backward (roll-back meter) meter is inconsistent with PURA §39.914 and §39.916. (33 TexReg 3735) (2008)). PURA §39.914(d) and §39.916(f) require that meters for DRG be capable of measuring in-flows and out-flows, which roll-back meters are incapable of. Section 39.914(c) and §39.916(j) further provide that, in an area with customer choice, a DRGO and its REP may agree that the price for energy sold by the DRGO is the wholesale clearing price of the energy at the time of day that it is made available to the grid. Absent the ability to quantify out-flows, there is no basis for the DRGO and REP to determine when the energy is made available and arrive at the value of this energy in the wholesale market. PURA §39.914 and §39.916 do not differentiate the required meters by whether the meters are located in an area with customer choice. Therefore, these provisions prohibit roll-back meters in both areas with customer choice and areas without customer choice.

There are five electric utilities providing retail service in areas without customer choice: Cap Rock Energy Corporation (Cap Rock), EPE, Entergy Texas, Inc. (Entergy), Southwestern Electric Power Company (SWEPCO), and Southwestern Public Service Company (SPS). Cap Rock, EPE, and SWEPCO are subject to PURA §39.914 and §39.916, whereas Entergy and SPS are not. PURA §39.452(d) exempts Entergy from these sections, and PURA §39.402(a) exempts SPS from these sections.

However, even though PURA §39.914 and §39.916 do not apply to Entergy and SPS, PURA §§14.001, 35.061, and 38.002 give the commission the authority to limit the use of roll-back meters by Entergy and SPS in the same manner as PURA §39.914 and §39.916 limits their use for all other electric utilities. The commission adopts this approach for Entergy and SPS, because it advances the goals for renewable energy as provided in PURA §39.904 and in order to consistently treat all similarly situated DRGOs.

PURA §39.914 and §39.916 do not specify a deadline to eliminate the use of roll-back meters. As a result, the commission has discretion in the manner that it transitions existing QFs away from roll-back meters. The commission concludes that a QF operating under existing §25.242(h)(4) in an area without customer choice will be allowed to continue to use a roll-back meter until its existing contract requiring the use of a roll-back meter expires. This approach avoids affecting existing contractual rights. However, the roll-back meter must be replaced prior to the introduction of customer choice because, as discussed above, the separate metering of in-flows and out-flows are necessary to meet the requirements of PURA §39.914(c) and §39.916(j). In addition, for a QF whose contract does not require the use of a roll-back meter, the commission has established a deadline of June 30, 2009 for the electric utility to replace the meter, which is a reasonable period of time for the electric utility to meet this requirement.

General Comments

In their initial comments, ARM and AEP expressed support for §25.217, finding it straightforward, simple, and consistent with PURA §39.914 and §39.916. They went on to state that §25.213, adopted in the first phase of this proceeding, had properly rejected proposals to incorporate a concept of "net metering" that

set the value of out-flows at the retail price of in-flows, and stated that this issue should not be revisited in the second phase of the project. In its public hearing testimony, TEEP stated that while the commission may be uncertain of the Legislature's intent by its use of the term "net metering," TEEP did not understand that it had been rejected. Henry B. Williams stated that the commission was creating confusion by using the term without a sufficiently clear context, stating that the term should refer only to the means by which the difference between in-flow and out-flow is determined, with billing being a separate consideration. SunPower stated that the language in PURA §39.914 and §39.916 does not preclude use of traditional net metering and asked that the commission reconsider its approach. David Smith, a manufacturer of small wind turbines, stated that HB 3693 had been hailed as a victory for his industry, but that the commission's rules were giving REPs discretion on whether and at what price out-flows would be purchased.

HelioVolt, citing low levels of solar generation in the state, stated that the commission should exercise its discretion to support continued investment in the expansion of alternative energy production. TEEP concurred in its hearing comments. Public Citizen stated that the rule would increase risk for small scale investors in an electricity market in which they were the weakest market participants, and that such investors need to be guaranteed a reasonable return on their investments through a regulated rate for the sale of their out-flows. It further stated that the commission's website, powertochoose.com, lists no service offerings by REPs to purchase out-flows. Public Citizen went on to state that the first stated mission of the PUC is to protect consumers, but that the rule protects only investor-owned utilities and transmission companies, and that state energy policy must encourage small-scale renewable energy investment in the same way that large-scale wind investment has been underwritten by the competitive renewable energy zone (CREZ) rule, or Texas will risk falling farther behind other states in small renewable energy.

Reliant stated that the deregulated market is working in Texas, and that the competitive marketplace will give DRG owners (DRGOs) negotiating power in the determination of the value of their out-flows.

TEEP stated that there were benefits to the economy, the environment, and national security associated with rapid and widespread adoption of renewable energy technologies, especially distributed renewable energy, and that energy policy in Texas should encourage renewable energy investment and innovation.

Commission Response

As discussed above, in adopting §25.213 in the current project, the commission concluded that the use of a roll-back meter is inconsistent with PURA §39.914(d) and §39.916(f). In addition, PURA does not provide for financial incentives, apart from the possibility of obtaining renewable energy credits, or guaranteed returns for DRGOs.

Consumer Protections and Disclosures

TREIA and TXSEIA stated that the commission should consider actions it could take to ensure electricity customers in all areas of the state have convenient access to accurate, comparative information regarding the out-flow buyback offers and net metering arrangements available to them. Public Citizen proposed and TXSEIA and TREIA agreed that certain customer protections be added to encourage DRG. Specifically, Public Citizen stated that the commission should require a disclosure statement in every rate contract that identifies the rate paid by the REP for energy out-flows, including whether the rate is variable and if variable, the published index on which the rate is based and the basis for adjustment; time periods for which variable rates are tracked; market clearing price of energy during the period of energy production by the customer with DRG; the time period or number of billing cycles for which energy production may be carried over to offset energy consumption; and the rate paid by the customer for energy in-flows.

ARM stated that the disclosure proposals offered by Public Citizen are more appropriately addressed in the context of pending Project Number 35768, *Rulemaking Relating to Retail Electric Provider Disclosures to Customers*.

Commission Response

The commission agrees with ARM that the disclosure requirements are more appropriately addressed in the context of Project Number 35768. The commission posed a question in the proposal for publication in Project Number 35768 relating to this topic. Therefore, the commission declines to change §25.217 to address this issue. §25.217(b)(1)

TREIA and TXSEIA recommended removing the word "facility" as it is a defined term in §25.5 where it has a different meaning, thus creating the possibility for confusion.

Commission Response

The commission agrees and has changed the rule accordingly.

HelioVolt and TEEP proposed that the term "net metering" be defined, noting that this had been recommended in comments filed during the rulemaking project for §25.213.

Commission Response

Section 25.217 and §25.213 provide extensive provisions on metering for distributed renewable generation under PURA §39.914 and §39.916, and the commission does not believe that the definition of "net metering" would provide additional clarity in this area.

HelioVolt stated that the term "surplus energy" was not defined in either the proposed rule or §39.916 and stated that the settlement period for surplus energy should be equal to the customer's billing period and that such a definition would make net metering (a meter that runs forward and backward) available to smaller customers without contradicting the letter of the law.

Commission Response

Under HelioVolt's recommendation, if adopted, there would be no basis for time of generation to be reflected in the price of surplus energy (which can be advantageous to the DRGO), which is a required option under PURA §39.916(j). Further, the commission believes that competition is enhanced when REPs are free to craft widely varying service offerings, and thus declines to mandate that the settlement period for surplus energy be equal to the customer billing period.

§25.217(c)(1)(A)

TREIA, TXSEIA, and Public Citizen stated that the original language of HB 3693 did not stipulate that DRG equipment have a five year warranty remaining, only that it have a five year warranty. They opined that the legislative intent was for a five year original manufacturer's warranty to be an indication of acceptable quality and reliability standards. Oncor sought confirmation that the transmission and distribution utility (TDU) would be able

to rely on the DRGO or independent school district solar generation (ISD-SG) Owner to affirm the existence and duration of the warranty.

Commission Response

The commission agrees with TREIA, TXSEIA, and Public Citizen and changes the rule accordingly. The commission disagrees with Oncor that the DRGO or ISD-SG Owner's affirmation of such a warranty is sufficient. To ensure that this requirement is met, the utility cannot rely solely on such an affirmation, but must obtain adequate tangible evidence of the five-year original manufacturer's warranty. §25.217(c)(3)

Solar Alliance and TREIA and TXSEIA recommended changing §25.217(c)(3) to refer to "a DRGO or ISD-SG Owner whose generation capacity is not more than 2,000 kW" to better track the language of PURA §39.916.

Commission Response

The commission agrees and has changed the rule accordingly. §25.217(c)(5)

The Solar Alliance, TREIA, TXSEIA, and TEEP stated that instead of mentioning §25.242(h)(4)(C), the new §25.217(c)(5) should refer more generally to §25.242(h)(4) or §25.242(h)(2) - (4).

Commission Response

The commission agrees and has changed the rule to refer to §25.242(h)(4).

§25.217(d)

EPE recommended changes to §25.217(d) and §25.242(f) that would give a bundled utility outside ERCOT ownership of renewable energy credits (RECs) associated with power sold under this rule to that utility. EPE stated that if the commission does not allow utilities to negotiate prices for DRG energy while REPs in ERCOT have authority to negotiate, it should compensate for this disparity by requiring the transfer of those credits to the bundled utility. EPE recommended changes to §25.217(d) and §25.242(f) that would transfer to the utility all RECs associated with energy sold under §25.217 to that utility. Sun Power in reply stated that the statute does not require that outcome, and argued that transferring the RECs would reduce the incentive to install DRG in all areas. TREIA and TXSEIA stated that the existing rules regarding RECs do not require transfer of RECs to a utility that purchases energy, that there is no particular policy goal that would be met by doing so, and that doing so would work against the policy goal of encouraging distributed generation.

Commission Response

The commission disagrees with EPE. PURA §39.914 and §39.916 address the purchase of surplus electricity by the utility, and the purchase price should reflect the value of that electricity, not the value of the electricity plus the value of the associated RECs, which can be traded separately from the electricity. In addition, distributed generation facilities have the ability to obtain certification as QFs and would be entitled to compensation for energy sold to a bundled utility at up to the utility's avoided cost. The rule that is being adopted would apply the avoided cost standard to the purchase by a bundled utility of the output of a DRG or ISD-SG, whether it has obtained this certification or not. The commission believes that one of the Legislature's objectives in adopting these sections was to provide incentives for customers to invest in distributed renewable generation facilities. Consistent with this objective, the commission concludes that the DRGO or ISD-SG Owner should not be required to sell RECs as part of its sale of electricity to the utility.

Public Citizen stated that REC credits should be listed on the bill sent by the REP to the DRGO as part of a broader customer protection plan. Reliant stated that neither the transmission and distribution service provider (TDSP) nor the REP knows precisely what level of REC credits the customer will receive, since neither the TDSP nor the REP administer the REC program.

Commission Response

The commission does not believe adding REC credits to the bill content requirement is appropriate, as REC credits are not the responsibility of the REP or the utility.

Proposed §25.217(e)

The commission declines to address at this time whether DRGOs and ISD-SG Owners are required to register as power generation companies pursuant to §25.109 of this title. The commission is not addressing this issue because requiring registration of small DRGOs and ISD-SG Owners would place a burden on these entities that outweighs the public benefits of such registration. However, because the commission's legal authority to waive registration for these entities is unclear, the commission will refer the matter for legislative consideration in its Scope of Competition in Electric Markets in Texas report to the 81st Legislature. As a result, the commission has deleted proposed §25.217(e) and moved the REC generator certification requirement to §25.217(d).

Adopted §25.217(e)(1)

TREIA and TXSEIA stated that in areas of the state in which customer choice has not been introduced, the electric utility serving the load of an ISD-SG Owner should buy the net production at a value consistent with §25.242, regardless of the ISD-SG Owner's status as a QF. EPE requested that the commission reject this recommendation. EPE stated that adoption of this suggestion by TREIA and TXSEIA would create conflict between the rule and the requirements for QFs outlined in PURA, the federal Public Utility Regulatory Policies Act of 1978 (PURPA), and 18 C.F.R. 292.207 of the Federal Energy Regulatory Commission's (FERC's) regulations implementing PURPA. EPE stated that PURA §31.002 defines an "electric utility" to include: "a person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state." PURA §31.002(6)(B) exempts QFs from this definition, and §31.002(6)(J) exempts persons that furnish electric service only to themselves, their employees, or their tenants. DRG and ISD-SG facilities are not exempt from the definition of electric utility under PURA. Thus, for DRG and ISD-SG facilities in areas outside of ERCOT, such entities must self-certify as QFs before an electric utility can be required to buy their power.

Commission Response

The commission disagrees with EPE. Pursuant to PURA §31.002(6)(J)(ii), a person that sells electricity to an electric utility is not an electric utility if its generating facility is used primarily to produce electric energy for the person's own consumption

Adopted §25.217(e)(2)

TXU stated that the term "price" should be replaced with the term "value" to be consistent with PURA §39.914 and §39.916. It further commented that the term "price" tends to imply a specific

constant monetary amount while the term "value" is representative of a fluid material worth such as an amount that varies with conditions, as is the case with market clearing price for energy (MCPE). TEEP, Reliant, and ARM concurred with TXU's requested modification. ARM recommended that, as an alternative, the language could be modified to include the phrase "price or value" rather than one or the other.

Commission Response

Consistent with PURA §39.914 and §39.916, the commission has changed "price" to "value." The commission appreciates TXU's comments, but notes that it is not always practical to draw the distinctions between the terms "price" and "value" that TXU suggests.

TEEP recommended a guaranteed minimum price that fosters investment in DRG but at the same time opined that it was the Legislature's intent to encourage rates that recognize the value of production during peak periods.

Commission Response

The commission agrees in part with TEEP. In an area with customer choice, the commission does not have the authority to impose a purchase price on the DRGO's or ISD-DG Owner's REP. A DRGO or ISD-DG Owner has a choice of REP and therefore can negotiate with more than one REP in an effort to obtain the best deal for the sale of its electricity. However, in an area without customer choice, the DRGO's or ISD-DG Owner's host electric utility will often be the only practical option to sell electricity. In areas without customer choice, the commission does have the authority to impose a purchase price on the electric utility where the DRGO or ISD-DG Owner and the electric utility do not agree to a price. The commission has set this price at avoided cost, calculated in a manner consistent with §25.242, the QF rule and 18 C.F.R 292.304. Avoided cost is an appropriate purchase price, because it is equal to the cost the electric utility would have incurred had it not purchased from the DRGO or ISD-DG Owner. The electric utility would need to prove the reasonableness of any price above avoided cost.

ARM and Reliant Energy stated that the rule appears to impose a strict obligation on an ISD-SG owner to sell its out-flow to its REP, regardless of whether the ISD-SG owner wishes to sell any out-flow pursuant to a contract with its REP. Both parties stated that there is not obligation on the ISD-SG owner to sell out-flows in PURA §39.914(c). ARM stated that PURA §39.914(c) requires an ISD-SG owner to sell any out-flow to the REP at an agreed-upon value only if it enters into a contractual relationship with the REP for such a sale. ARM and Reliant Energy recommended a rule change that would impose the requirement in subsection (f)(2) only on ISD-SG owners "who choose to sell out-flows." TREIA and TXSEIA, on the other hand, supported the rule as proposed because it more tightly corresponds to the original language in HB 3693 and because it would require REPs serving ISD-SGs to develop means to buy back out-flows to the benefit of their school district customers with solar generation. In the view of TREIA and TXSEIA, the difference in the language regarding school districts and other customers in PURA reflects a desire by the Legislature to promote the adoption of out-flow buyback options by more REPs. TREIA and TXSEIA stated that school districts would benefit from out-flow buyback options and the rule as proposed would have a positive effect on the marketplace by encouraging the development of buyback options by a greater number of REPs. TEEP also disagreed with ARM and Reliant Energy's request to limit the rule to ISDs or others "who choose to sell." According to TEEP, the presumption of the rule should be that the DRG investor should earn a fair return and the higher the return, the better.

Commission Response

The commission agrees with ARM and Reliant that PURA §39.914(c) does not make sale of surplus electricity obligatory for school districts and adopts ARM's proposed language.

ARM recommended that the term "facility" be replaced with the term "premise" given that the REP serves the location rather than just a building or facility.

Commission Response

The commission agrees that use of the term "premises" is more appropriate, because the ISD-DG may be separate from the consuming facility served by the REP.

Solar Alliance stated that the DRGO may not necessarily be the retail customer who has the relationship with a REP or an electric utility. Solar Alliance stated that it is not appropriate to refer to the DRGO in subsections (f) and (g) in the context of sale of out-flows because it is the owner of the DRG who is the entity that has the right to sell the out-flows--not the retail customer.

Commission Response

The commission declines to address at this time whether a person other than the end-use customer may own DRGO or ISD-SG. Having third parties own DRG and ISD-SG may have a number of benefits, including tax benefits and economies of scale. However, it is unclear whether a third party could own the facilities without becoming an electric utility, with all the associated duties and responsibilities, and the commission will refer the matter for legislative consideration in its Scope of Competition in Electric Markets in Texas report to the 81st Texas Legislature.

HelioVolt stated that the requirement that DRGOs and REPs reach an agreement on the price of out-flows would create uncertainty to a potential DRG investor because the value of the out-flow depends on the settlement profile proposed and accepted by ERCOT. REPs would have to determine the extent to which profiling of the solar DRG resource will enable them to receive full value for their purchases in ERCOT settlement before negotiating prices. Since the negotiated price could be based upon the "clearing price of energy at the time of day," negotiating and administrating a price for surplus electricity would be complicated. HelioVolt opined that the ERCOT processes for settlement that reflect time of generation for solar generation which will be developed by January 1, 2009 would ensure that REPs would benefit financially by serving solar DRGOs. However, HelioVolt questioned the extent to which this financial benefit to the REP will accrue to solar DRG customers. The end result would be to encourage installation of smaller solar DRG systems to avoid metering costs and out-flows while REPs would be saddled with customers who reduce peak consumption by installing solar DRG facilities without informing the REP. As a result, the REP would be burdened with a standard profile that ignores the installation of solar DRG and must overpay for the energy it purchases for its customers.

HelioVolt recommended a scheme based around net metering over the customer's billing period, a feed-in tariff for net surplus generation, and standard profiling of solar DRG, which it said would be easier to implement without creating undue burdens on ERCOT ratepayers, TDSPs, or REPs. According to HelioVolt, net metering would encourage solar DRG customers to invest

in slightly larger solar systems up to the level where output nets against consumption with the added benefits that the larger solar systems would reduce peak demand and the investment needed in transmission and distribution as well as put downward pressure on ERCOT energy prices during summer peak periods.

HelioVolt stated that a feed-in tariff for out-flow sales in excess of consumption could provide a default value to anchor negotiations between REPs and solar DRG customers and thereby encourage customers to reveal their plans to install solar DRG and allow REPs to claim credit for those installations in their demand profiles while discouraging REPs from "redlining" solar customers.

Reliant Energy stated that HelioVolt's recommendation of a "feed-in tariff" directly conflicts with PURA §§39.914(c), 39.916(j), and 39.001 and should therefore be rejected. Reliant Energy commented that PURA §39.914(c) and §39.916(j) require surplus electricity to be sold to the REP at a value agreed to between the DRGO or ISD-SG and their REP. In addition, HelioVolt's recommendation directly conflicts with PURA §39.001, which concludes that the production and sale of electricity is not a monopoly warranting regulation of rates, operations, and services and that prices should be determined by customer choices and the normal forces of competition.

HelioVolt stated that since solar generation follows a predictable pattern, an average price could be determined that reflected the expected value of solar DRG and any difference between the default price and wholesale electricity costs (adjusted for transmission and distribution losses) could be treated like unaccounted for energy (UFE) and uplifted to ERCOT as a whole. HelioVolt contended that this is a small cost that would be dwarfed by the benefits to ERCOT consumers from increased investment in solar energy.

ERCOT expressed concerns about HelioVolt's recommendation that the difference between the default solar generation price and wholesale electricity costs, adjusted for transmission and distribution line losses be processed akin to UFE and uplifted to the ERCOT grid as a whole. ERCOT stated that HelioVolt's recommendation could potentially create a new financial relationship between ERCOT and a REP. ERCOT requested that the commission maintain ERCOT's existing market structure, in which ERCOT has financial relationships only with qualified scheduling entities (QSEs). ERCOT stated that its UFE mechanisms deal with energy mechanisms and lack the capability to allocate differences between a REP's retail contract and wholesale pricing. According to ERCOT, the new ERCOT-REP financial relationship and new UFE monetary allocation would require changes to ERCOT's systems resulting in costs to ERCOT. ERCOT stated that if HelioVolt's recommendation is found to have merit, it should be vetted through the ERCOT stakeholder process to ensure a well-balanced market decision.

Commission Response

The commission agrees with Reliant Energy that pursuant to §39.914(c) and §39.916(j) the value of surplus energy to be sold to a REP is to be established by negotiation. The commission does not have the authority to prescribe a price for this energy or require a REP to buy it.

Adopted §25.217(e)(3)

TXU proposed language to clarify the meaning of a "REP's service." Additionally, it proposed the addition of language to support the possibility that the agreement between the ISD-SG Owner and the REP may have alternate termination and remittance requirements that should prevail. ARM sought to clarify that the remitted "outstanding amounts" to the ISD-SG Owner or DRGO may take the form of offsetting any delinquent bill for retail service. Reliant supported ARM's proposed modifications to these sections with the caveat that the retail customer and the DRGO are the same entity.

Commission Response

The commission agrees with TXU and ARM and adopts their proposed language with some modification.

Adopted §25.217(f)(2)

Similar to the amendment proposed for §25.217(f)(2), TXU proposed that the term "price" be replaced with the term "value" to be consistent with PURA §39.914 and §39.916 and because the term "value" is more representative of a fluid material worth such as an amount that may vary as conditions vary. Reliant Energy and ARM concurred with TXU's proposed modification. ARM recommended that, in the alternative, the language could be modified to include the phrase "price or value" rather than one or the other.

Commission Response

Consistent with PURA §39.914 and §39.916, the commission has changed "price" to "value". The commission appreciates TXU's comments, but notes that it is not always practical to draw the distinctions between the terms "price" and "value" that TXU suggests.

Reliant Energy stated that the owner of the DRG may not live at the premises to which the DRG is interconnected and therefore proposed language that would require the DRGO to sell its outflows to the REP that serves the load at the premises to which the DRG is interconnected rather than the REP that serves the load of the DRGO. ARM concurred with the revision proposed by Reliant Energy.

Commission Response

The commission agrees and adopts the language proposed by Reliant with slight modification.

Adopted §25.217(g)

Oncor requested that a date certain be added to transition language in the rule and recommended that March 31, 2009, be the deadline for new contracts under the new rules between existing DRGOs, ISD-SGOs, and their REPs. TDUs would then modify or replace meters for these customers appropriate for their service agreements with their REPs.

Commission Response

The commission agrees with Oncor's recommendation and has changed the rule accordingly.

Solar Alliance stated that assuming the retail customer will be the entity making the sale of outflows is inappropriate, because the owner of the DRG may not be the retail customer. EPE stated that, in situations where a DRGO is not the retail customer and wishes to use its energy to serve the retail customer and then sell the balance of the energy to the utility, then that DRGO is acting as a utility under PURA and would require a certificate of convenience and necessity before it could serve the retail customer. EPE recommended language excluding areas outside of ERCOT from the provision in §25.217(i) that allows the DRGO or ISD-SG Owner to act on behalf of the retail customer pur-

suant to §§25.211 - 25.213. TREIA and TXSEIA disagreed, and stated that third-party ownership of DRG had worked in other states. TREIA and TXSEIA recommended that the commission not address the issue regarding the status of third-party DRG as a utility in this proceeding, suggesting that this may be an appropriate legislative or commission issue at a later date.

Commission Response

The commission declines to address at this time the legality of third-party DRG. The commission has changed subsection (i) to address only the issue of a third party acting on behalf of a customer.

§25.242(f)(3)

TREIA and TXSEIA stated that the commission's proposed language changes to §25.242(f)(3) create ambiguity for QFs larger than 10 MW but interconnecting at distribution level voltages. Section 25.211 describes the interconnection requirements for DG up to 10MW. However, TREIA and TXSEIA stated that there are possible scenarios where QFs larger than 10 MW will interconnect at distribution level voltages. While these facilities are not considered DG under §25.211, the open access requirements of PURA and Subchapter I of the substantive rules allow these interconnections. Therefore, TREIA and TXSEIA believe that the original language of §25.242(f)(3) was more comprehensive and recommend that it not be altered.

Commission Response

The commission acknowledges that TREIA and TXSEIA have identified a gap in the proposed language of §25.242(f)(3); however, the commission declines to accept their recommendation that the original language of §25.242(f)(3) be retained, because §25.242(f)(3) should be updated to reflect §25.211 for interconnection with distributed generation. However, the commission has added language to fill the gap identified by TREIA and TXSEIA.

§25.242(h)

James and Annette Herrington stated that they own a 25 kW wind turbine and have a DRG interconnection agreement with Oncor using a digital meter that is read remotely and has three separate readings to measure energy produced, energy consumed, and net energy. The Herringtons said that their agreement with Oncor provides that they use the energy they produce at an equal retail rate and provide all excess to TXU for free. They stated that it is a fantasy to think that they could negotiate a price for the energy they produce. They claimed that there will be negative economic impacts on their local economy, Burkburnett, Texas, because there will be no market for renewable energy systems. They asked the commission to maintain a net metering program for units rated at 50 kW or less, inside and outside ERCOT, that allows for meters that roll forward and backward.

The Solar Alliance supported allowing existing QFs operating under §25.242(h)(4) in areas of the state in which customer choice has not been introduced to continue to do so. The Solar Alliance claimed that to do otherwise would impose an inappropriate burden on owners of distributed renewable generation. The Solar Alliance stated that unbundling issues do not exist outside of ERCOT and stated that if the commission decides that customers must change their meters, all cost should be borne by the electric utility.

TREIA and TXSEIA stated that the commission's interpretation of HB 3693's net metering language should not be imposed on any net metering customers outside ERCOT, existing or new, because the Legislature did not make clear its intent for that to happen and doing so would result in irreparable harm to customers. TREIA and TXSEIA recommended striking the proposed language in §25.242(h)(4)(C).

The Herringtons and Jeff and Donna Beaver stated that anyone that owns a renewable energy system that is rated at less than 50 kW, regardless of where they live, should be able to continue with whatever arrangement they currently have with their electric provider. Similarly, SunPower, Public Citizen, and Heliovolt stated that all existing QFs should be allowed to continue to operate under §25.242(h)(4). Heliovolt believed that existing QFs should receive retail rates for production that is purchased.

Public Citizen and Heliovolt stated that there is a very real potential for financial harm to current DRG owners outside of ERCOT if the commission does otherwise. Public Citizen stated that DRG owners made significant up-front capital investments for their systems, based on long-term financial returns made possible under existing net metering rules. Public Citizen stated that new investments would be more likely if net metering continues to be available.

TREIA, TXSEIA, and SunPower requested that the commission reject the suggestion or any interpretation of HB 3693 that the rights of QF owners must terminate at the end of their existing interconnection agreements. In addition, TREIA and TXSEIA stated that HB 3693 should not be read to supersede contracts outside of ERCOT. SunPower requested that the commission permit such parties to renew those agreements and continue to use their existing meters as long as they wish.

TREIA and TXSEIA recommended that AEP and other electric utilities be required to provide additional information about the length and expiration dates of existing interconnection contracts so that the commission can be fully informed about potential consequences of adopting AEP's recommendation. TREIA and TXSEIA also recommended that the commission clarify what constitutes a removal or replacement of equipment so as to leave little ambiguity.

Commission Response

The commission addressed above the use of roll-back meters in response to comments on its question on this issue. As stated above, the commission has concluded that a QF operating under existing §25.242(h)(4) in an area without customer choice will be allowed to continue to use a roll-back meter until its existing contract requiring the use of a roll-back meter expires. This approach avoids affecting existing contractual rights. However, the roll-back meter must be replaced prior to the introduction of customer choice because, the separate metering of in-flows and out-flows are necessary to meet the requirements of PURA §39.914(c) and §39.916(j). In addition, for a QF whose contract does not require the use of a roll-back meter, the commission has established a deadline of June 30, 2009 for the electric utility to replace the meter, which is a reasonable period of time for the electric utility to meet this requirement.

PURPA does not provide specific net metering requirements, other than the definition of "net metering" in PURPA §2621 as a "service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period." The standard in §2621 is one that a utility regulator

must consider, but it has no obligation to adopt it. In contrast, PURA §39.914(d) and §39.914(f) provide specific metering requirements, namely, meters that "measure load and generator output" or "in-flow and out-flow at the point of common coupling." Thus, the commission must require metering that satisfies PURA's specific requirements, so long as is not inconsistent with PURPA. Here, PURA requires metering that can provide the discrete measurements of in-flow and out-flow. Accordingly, the commission declines TREIA and TXSEIA's suggestion to strike the proposed language in §25.242(h)(4)(C). A meter that rolls backward and forward cannot and does not provide the discrete measurements required by PURA.

The commission does not agree with the Solar Alliance's recommendation that all costs for changing meters be borne by the utility. As required by PURA §39.914(d) and §39.914(f), §25.213(b)(6) requires that the distributed renewable generation owner pay any significant differential cost of the new metering.

§25.242(h)(7)

AEP recommended that §25.242(h)(7) be added for clarity and consistency to read:

(h)(7) Metering Requirements. Notwithstanding subsection (h)(4), metering requirements for qualifying facilities and distributed renewable generators shall be consistent with §25.213.

TREIA/TXSEIA opposed this additional section as being unnecessary and potentially creating an additional cost on customers and utilities.

Commission Response

The commission does not believe that adding the clause proposed by AEP is necessary or provides additional clarity, and therefore does not make the recommended change.

All comments, including any not specifically referenced herein, were fully considered by the commission.

The commission will recommend further steps to encourage DRG growth in the 2009 Scope of Electric Competition Report.

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.217

This new section is adopted under the PURA, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §14.001, which gives the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; PURA §35.061, which requires the commission to adopt and enforce rules to encourage the economical production of electric energy by qualifying facilities; PURA §38.002, which authorizes the commission to adopt standards relating to measurement, quality of service, and metering standards; PURA §39.101(b)(3), which provides the commission the authority to adopt and enforce rules relating to customers' right of access to on-site distributed generation; PURA §39.108(1) which provides that PURA Chapter 39 may not interfere with or abrogate the rights or obligations of any party to a contract with an investor-owned electric utility, river authority, municipally owned utility, or electric cooperative; PURA §39.914, which provides for the sale of out-flows produced by a public school building's solar electric generation panels; and PURA §39.916, which directs the commission to establish standards for distributed renewable generation.

Cross Reference to Statutes: PURA §§14.001, 14.002, 35.061, 38.002, 39.101, 39.108, 39.914, and 39.916.

§25.217. Distributed Renewable Generation.

(a) Application. This section applies to owners of distributed renewable generation, retail electric providers (REPs), the program administrator for the renewable energy credits trading program pursuant to §25.173 of this title (relating to Goal for Renewable Energy), and electric utilities, including transmission and distribution utilities (TDUs), but excludes river authorities that are electric utilities.

(b) Definitions. The following terms when used in this section have the following meanings, unless the context indicates otherwise:

(1) Distributed renewable generation (DRG)--Electric generation equipment with a capacity of not more than 2,000 kilowatts provided by a renewable energy technology, as defined by Public Utility Regulatory Act §39.904(d), installed on a retail electric customer's side of the meter.

(2) Distributed renewable generation owner (DRGO)--A person who owns DRG.

(3) Independent school district solar generation (ISD-SG)--Solar electric generation equipment installed on the customer's side of the meter at a building or other facility owned or operated by an independent school district, irrespective of the level of generation capacity.

(4) Independent school district solar generation owner (ISD-SG Owner)--A person who owns ISD-SG.

(5) Interconnection--The physical connection of DRG or ISD-SG to an electric utility distribution system in accordance with this section and §25.211 of this title (relating to Interconnection of On-Site Distributed Generation (DG)), §25.212 of this title (relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation), and §25.213 of this title (relating to Metering for Distributed Renewable Generation).

(6) Out-flow--Energy produced by DRG or ISD-SG and delivered to an electric utility distribution system.

(c) Interconnection.

(1) An electric utility shall permit interconnection of DRG or ISD-SG if:

(A) the DRGO provides credible tangible proof that the DRG to be interconnected has or had an original manufacturer's warranty against breakdown or undue degradation for at least five years;

(B) the rated capacity of the DRG or ISD-SG does not exceed the electric utility's service capacity; and

(C) the DRG or ISD-SG is in compliance with applicable requirements of §25.211 and §25.212 of this title.

(2) An electric utility may disconnect a DRG or ISD-SG pursuant to §25.211(e) of this title.

(3) An electric utility shall not require a DRGO or ISD-SG Owner whose generation capacity is not more than 2,000 kilowatts and whose DRG or ISD-SG meets the standards established by this section

to purchase an amount, type, or classification of liability insurance the DRGO or ISD-SG Owner would not have in the absence of the DRG or ISD-SG.

(4) An existing or prospective DRGO or ISD-SG Owner may request interconnection by submitting an application for interconnection with the electric utility. The application shall be on a form approved by the commission and processed by the electric utility in accordance with §25.211 and §25.212 of this title.

(5) Metering is addressed by §25.213 of this title and, for certain qualifying facilities, by §25.242(h)(4) of this title (relating to Arrangements Between Qualifying Facilities and Electric Utilities).

(d) Renewable Energy Credits (RECs). A DRGO or ISD-SG is subject to the certification requirements in §25.173 of this title to be eligible to receive RECs. Any RECs or compliance premiums resulting from the operation of DRG or ISD-SG are the property of the DRGO or ISD-SG Owner unless sold or otherwise transferred by the DRGO or ISD-SG Owner. The REC program administrator shall award the RECs or compliance premiums to the DRGO or ISD-SG Owner pursuant to §25.173 of this title. The purchase of out-flows does not automatically confer any rights of REC ownership on the purchaser.

(e) Sale of out-flows by an ISD-SG Owner.

(1) In areas of the state in which customer choice has not been introduced, the electric utility serving the load of an ISD-SG Owner shall buy all ISD-SG out-flows at a value consistent with §25.242 of this title.

(2) In areas in which customer choice has been introduced, ISD-SG Owners who choose to sell out-flows shall sell out-flows to the REP that serves the premises at which the ISD-SG is located, at a value to which both parties agree.

(3) If a REP's service to an ISD-SG Owner is terminated, any outstanding amounts due to the ISD-SG Owner may be used to offset outstanding bill amounts but in all cases shall be remitted by the REP no later than 30 days after the REP receives the usage data and any related invoices for non-bypassable charges.

(f) Sale of out-flows by a DRGO.

(1) In areas in which customer choice has not been introduced, the electric utility serving the DRGO's load shall buy all DRG out-flows at a value consistent with the requirements of §25.242 of this title.

(2) In areas in which customer choice has been introduced, DRGOs who choose to sell out-flows shall sell their out-flows to the REP that serves the premises at which the DRG is located at a value to which both parties agree.

(3) If a REP's service to a DRGO is terminated, any outstanding amounts due to the DRGO may be used to offset outstanding bill amounts but in all cases shall be remitted by the REP no later than 30 days after the REP receives the usage data and any related invoices for non-bypassable charges.

(g) Transition provision. Electric utilities and REPs shall make reasonable efforts to inform existing and potential DRGOs and ISD-SG Owners of their rights and obligations pursuant to this chapter, and shall change existing metering and purchase arrangements to conform to this section by June 30, 2009. However, a metering or purchase arrangement that is required by a contract that exists on the effective date of this section shall be changed to conform to this section effective the date the contract expires. The expiration date of such a contract may be extended by the DRGO or ISD-SG Owner if the existing terms of the contract give the DRGO or ISD-SG Owner the unilateral right to extend the expiration date. Notwithstanding the foregoing provisions of this subsection, a roll-back meter must be replaced no later than the date customer choice is offered in the area in which the roll-back meter is located.

(h) Authority to act on behalf of a customer. If any person purports to act on behalf of the retail customer pursuant to this section or §§25.211, 25.212 or 25.213 of this title, such person must demonstrate contractual authority to do so by letter of agency or otherwise.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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SUBCHAPTER J. COSTS, RATES AND TARIFFS
DIVISION 1. RETAIL RATES

16 TAC §25.242

The amended section is adopted under the PURA, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §14.001, which gives the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; PURA §35.061, which requires the commission to adopt and enforce rules to encourage the economical production of electric energy by qualifying facilities; PURA §38.002, which authorizes the commission to adopt standards relating to measurement, quality of service, and metering standards; PURA §39.101(b)(3), which provides the commission the authority to adopt and enforce rules relating to customers' right of access to on-site distributed generation; PURA §39.108(1) which provides that PURA Chapter 39 may not interfere with or abrogate the rights or obligations of any party to a contract with an investor-owned electric utility, river authority, municipally owned utility, or electric cooperative; PURA §39.914, which provides for the sale of out-flows produced by a public school building's solar electric generation panels; and PURA §39.916, which directs the commission to establish standards for distributed renewable generation.

Cross Reference to Statutes: PURA §§14.001, 14.002, 35.061, 38.002, 39.101, 39.108, 39.914, and 39.916.

§25.242. Arrangements Between Qualifying Facilities and Electric Utilities.

(a) Purpose. The purpose of this section is to regulate the arrangements between qualifying facilities, retail electric providers with the price to beat obligation (PTB REPs), and electric utilities as re-

quired by federal and state law in a manner consistent with the development of a competitive wholesale power market.

(b) Application. This section applies to all PTB REPs and to all electric utilities, including transmission and distribution utilities. The provisions of this section concerning purchase or sale of electricity between an electric utility and a qualifying facility do not apply to a transmission and distribution utility. This section does not apply to municipal utilities, river authorities, or electric cooperatives.

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Avoided costs--The incremental costs to a PTB REP, or electric utility of electric energy, which, but for the purchase from the qualifying facility or qualifying facilities, such PTB REP or electric utility would generate itself or purchase from another source.

(2) Back-up power--Electric energy or capacity supplied to replace energy or capacity ordinarily generated by a qualifying facility's own generation equipment during an unscheduled outage of the qualifying facility.

(3) Cost of decremental energy--The cost savings to a utility associated with the utility's ability to back-down some of its units or to avoid firing units, or to avoid purchases of power from another source because of purchases of power from qualifying facilities.

(4) Electric utility--For purposes of this section, an integrated investor-owned utility that has not unbundled in accordance with Public Utility Regulatory Act §39.051.

(5) Firm power--From a qualifying facility, power or power-producing capacity that is available pursuant to a legally enforceable obligation for scheduled availability over a specified term.

(6) Host utility--The utility with which the qualifying facility is directly interconnected.

(7) Maintenance power--Electric energy or capacity supplied during scheduled outages of the qualifying facility.

(8) Market price--The market-clearing price of energy (MCPE) in the balancing energy market for the Electric Reliability Council of Texas (ERCOT) congestion zone in which the power is produced, minus any administrative costs, including an appropriate share of ERCOT-assessed penalties and fees typically applied to power generators.

(9) Non-firm power from a qualifying facility--Power provided under an arrangement that does not guarantee scheduled availability, but instead provides for delivery as available.

(10) Parallel operation--A mode of operation which enables a qualifying facility to export automatically any electric capacity which is not consumed by the qualifying facility or the user of the qualifying facility's output. Parallel operation results in three possible states of operation at any point in time:

(A) The qualifying facility is generating an amount of capacity that is less than the customer's load. The customer is therefore a net consumer.

(B) The qualifying facility is generating an amount of capacity that is more than the customer's load. The customer is therefore a net producer.

(C) The qualifying facility is generating an amount of capacity that is equal to the customer's load. The customer is therefore neither a net producer nor a net consumer.

(11) Purchase--The purchase of electric energy or capacity or both from a qualifying facility by a PTB REP or electric utility.

(12) Purchasing utility--The electric utility that is purchasing a qualifying facility's capacity and/or energy.

(13) Quality of firmness of a qualifying facility's power--The degree to which the capacity offered by the qualifying facility is an equivalent quality substitute for firm purchased power or an electric utility's own generation. At a minimum the following factors should be considered in determining quality of firmness:

(A) reliability of generation and interconnection;

(B) forced outage rate;

(C) availability during peak periods;

(D) the terms of any contract or other legally enforceable obligation, including, but not limited to, the duration of the obligation, performance guarantees, termination notice requirements, and sanctions for noncompliance;

(E) maintenance scheduling;

(F) availability for system emergencies, including the ability to separate the qualifying facility's load from its generation;

(G) the individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system;

(H) other dispatch characteristics;

(I) reliability of primary and secondary fuel supplies used by the qualifying facility; and

(J) impact on utility system stability.

(14) Retail electric provider with the price to beat obligation (PTB REP)--A REP that makes available a PTB pursuant to PURA §39.202.

(15) Sale--The sale of electric energy or capacity or both supplied to a qualifying facility.

(16) Supplementary power--Electric energy or capacity regularly used by a qualifying facility in addition to that which the facility generates itself.

(17) System emergency--A condition on a utility's system that is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.

(18) Transmission and distribution utility (TDU)--As defined in §25.5 of this title (relating to Definitions).

(d) Negotiation and filing of rates.

(1) Negotiated rates or terms. Nothing in this section shall:

(A) limit the authority of any PTB REP or electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differs from the rate or terms or conditions that would otherwise be required by this section; or

(B) affect the validity of any contract entered into between a qualifying facility and a PTB REP or electric utility for any purchase before the adoption of this section.

(2) Filing of rates. All rates for sales to qualifying facilities, contractual or otherwise, shall be contained in the schedule of rates of the electric utility filed with the commission.

(e) Availability of electric utility system cost data.

(1) Applicability. Paragraph (2) of this subsection applies to large electric utilities whose total sales of electric energy for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year. Paragraph (3) of this subsection applies to all other electric utilities.

(2) Data request for large electric utilities. Large utilities shall file the following data:

(A) the estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of one, ten and 100 megawatts or not more than 10% of the system peak demand for systems of less than 1,000 megawatts. The avoided cost shall be stated on a cents-per-kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next nine years.

(B) the electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding nine years.

(C) for the current year and each of the next nine years, the estimated capacity costs at completion of the planned capacity additions and planned capacity purchases, on the basis of dollars-per-kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt-hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases. Such information shall be submitted in accordance with the Federal Energy Regulatory Commission Regulations, 18 Code of Federal Regulations, §292.302 and shall be sufficient for qualifying facilities to reasonably estimate the utility's avoided cost. Accompanying each filing pursuant to this rule shall be a detailed explanation of how the data was determined, including sources and assumptions employed.

(3) Special requirements for small electric utilities. Affected utilities shall, upon request:

(A) provide to an interested person comparable data to that required under paragraph (2) of this subsection to enable qualifying facilities to estimate the electric utility's avoided costs; or

(B) with regard to an electric utility that is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide to an interested person the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

(4) Filing date. By February 15 each year, large electric utilities shall file with the commission and shall maintain for public inspection the data set forth in paragraph (2) of this subsection.

(f) PTB REP and electric utility obligations.

(1) Obligation to purchase from qualifying facilities.

(A) In accordance with this subsection and subsection (g) of this section, each PTB REP and electric utility shall purchase any energy that is made available from a qualifying facility:

(i) directly to the PTB REP or electric utility; or

(ii) indirectly to the PTB REP or electric utility in accordance with paragraph (4) of this subsection.

(B) Each electric utility shall purchase energy from a qualifying facility with a design capacity of 100 kilowatts or more within 90 days of being notified by the qualifying facility that such energy is or will be available, provided that the electric utility has sufficient interconnection facilities available. If an agreement to purchase energy is not reached within 90 days after the qualifying facility provides such notification, the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy delivered to the electric utility correspondent with the 90th day following such notice. If the electric utility determines that adequate interconnection facilities are not available, the electric utility shall inform the qualifying facility within 30 days after being notified for distribution interconnection, or within 60 days for transmission interconnection, giving the qualifying facility a description of the additional facilities required as well as cost and schedule estimates for construction of such facilities. If an agreement to purchase energy is not reached upon completion of construction of the interconnection facilities or 90 days after notification by the qualifying facility that such energy is or will be available, the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy delivered to the electric utility correspondent with the time of interconnection or the 90th day, whichever is later. Nothing in this subsection shall be construed in a manner that would preclude a qualifying facility from notifying and contracting for energy with a utility for sale of energy prior to 90 days before delivery of such energy.

(C) Each PTB REP shall purchase energy from a qualifying facility with a design capacity of 100 kilowatts or more within a timely fashion after being notified by the qualifying facility that such energy is or will be available.

(2) Obligation to sell to qualifying facilities. In accordance with subsection (k) of this section, each electric utility shall sell any energy and capacity requested to any qualifying facility located within the electric utility's service area. Each PTB REP shall also sell any energy requested to any qualifying facility; however, those sales shall be at market based rates. Nothing shall restrict the ability of any qualifying facility to purchase energy from any REP.

(3) Interconnection. Interconnection by a qualifying facility is addressed by Subchapter I, Division 1, of this chapter (relating to Transmission and Distribution) if the interconnection is to a transmission system and by §25.211 of this title (relating to Interconnection of On-site Distributed Generation) if the interconnection is to a distribution system, except if the interconnection is regulated by the Federal Energy Regulatory Commission.

(4) Transmission to other electric utilities. Transmission service provided by an electric utility in the ERCOT power region to a qualifying facility shall be governed by Subchapter I of this chapter.

(5) PTB REP and scheduling with qualifying facilities. A PTB REP shall use dynamic resource scheduling or responsibility transfer in ERCOT with any qualifying facility that requests such scheduling, as permitted by ERCOT. The PTB REP's cost of using dynamic resource scheduling or responsibility transfer attributable solely to purchases from qualifying facilities shall be charged to qualifying facilities that use such scheduling. If a qualifying facility uses static scheduling, the qualifying facility shall bear the costs for any imbalances resulting from the qualifying facility's failure to submit a schedule or to comply with the schedule.

(g) Rates for purchases from a qualifying facility.

(1) Rates for purchases of energy and capacity from any qualifying facility shall be just and reasonable to the customers of the electric utility or PTB REP and in the public interest, and shall not discriminate against qualifying cogeneration and small power production facilities.

(2) Rates for purchases of energy and capacity from any qualifying facility shall not exceed avoided cost. Rates for purchase shall be based upon a market-based determination of avoided costs over

the specific term of the contract or other legally enforceable obligation, the rates for such purchase do not violate this subsection if the rates for such purchase differ from avoided cost at the time of delivery. Payments which do not exceed avoided cost shall be found to be just and reasonable operating expenses of the electric utility.

(3) A QF may agree to commit, on a day-ahead basis, to deliver firm power for the next day to a PTB REP. Rates for purchase of this power shall be based on prices for the day that the power was actually delivered as reported or published in an independent third party index or survey of trades of commonly traded power products in ERCOT, provided that the index or survey is ERCOT-specific and is based upon enough transactions to represent a liquid market, and the commitment to deliver shall correspond with the relevant hours of delivery of those products.

(h) Standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(1) There shall be included in the tariffs of each electric utility standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less. The rates for purchases under this paragraph:

(A) shall be consistent with subsection (g) of this section, as it concerns purchases from a qualifying facility;

(B) shall consider the aggregate capacity value provided by multiple qualifying facilities with a design capacity of 100 kilowatts or less; and

(C) may differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(2) Terms and conditions unique to qualifying facilities with a design capacity of 100 kilowatts or less such as metering arrangements, safety equipment requirements, liability for injury or equipment damage, access to equipment and additional administrative costs, if any, shall be included in a standard tariff.

(3) The standard tariff shall offer at least the following options:

(A) parallel operation with interconnection through a single meter that measures net consumption;

(i) net consumption for a given billing period shall be billed in accordance with the standard tariff applicable to the customer class to which the user of the qualifying facility's output belongs;

(ii) net production will not be metered or purchased by the utility and therefore there will be no additional customer charge imposed on the qualifying facility;

(B) parallel operation with interconnection through two meters with one measuring net consumption and the other measuring net production;

(i) net consumption for a given billing period shall be billed in accordance with the standard tariff applicable to the customer class to which the user of the qualifying facility's output belongs;

(ii) net production for a given billing period shall be purchased at the standard rate provided for in paragraph (1)(A) and (B) of this subsection;

(C) interconnection through two meters with one measuring all consumption by the customer and the other measuring all production by the qualifying facility;

(i) all consumption by the customer for a given billing period shall be billed in accordance with the standard tariff applicable to the customer class to which the customer would belong in the absence of the qualifying facility;

(ii) all production by the qualifying facility for a given billing period shall be purchased at the standard rate provided for in paragraph (1)(A) and (B) of this subsection.

(4) In addition, each electric utility shall offer qualifying facilities using renewable resources with an aggregate design capacity of 50 kilowatts or less the option of interconnecting through a single meter that runs forward and backward.

(A) Any consumption for a given billing period shall be billed in accordance with the standard tariff applicable to the customer class to which the user of the qualifying facility's output belongs.

(B) Any production for a given billing period shall be purchased at the standard rate provided for in paragraph (1)(A) of this subsection.

(C) This option is not available if a contract for interconnection or the purchase of electricity is executed after December 31, 2008.

(5) Interconnection requirements necessary to permit interconnected operations between the qualifying facility and the utility and the costs associated with such requirements shall be dealt with in a manner consistent with Subchapter I of this chapter.

(6) The rates, terms and conditions contained in the standard tariff for qualifying facilities with a design capacity of 100 kilowatts or less shall be subject to review and revision by the commission.

(7) Except for qualifying facilities subject to §25.217 of this title (relating to Distributed Renewable Generation) requirements for the provision of insurance under this subsection shall be of a type commonly available from insurance carriers in the region of the state where the customer is located and for the classification to which the customer would belong in the absence of the qualifying facility. An enhancement to a standard homeowner's or farm and ranch owner's policy containing adequate liability coverage and having the effect of adding the electric utility as an additional insured or named insured is one means of satisfying the requirements of this paragraph. Such policies shall in each instance be on a form approved or promulgated by the Texas Department of Insurance and issued by a property or casualty insurer licensed to do business in the State of Texas.

(i) Tariffs setting out the methodologies for purchases of nonfirm power from a qualifying facility. Tariffs setting out the methodologies for purchases of nonfirm power from a qualifying facility shall be filed with the commission based on one of the following approaches:

(1) Rates for purchases of nonfirm power may, by agreement of both the electric utility and the qualifying facility, be based on the utility's average avoided energy costs. Administrative, billing, and metering costs shall be recovered through a monthly customer charge to the qualifying facility.

(2) PTB REPs and QFs may mutually agree to rates for purchases of nonfirm power that differ from the rates described in paragraph (4) of this subsection. Any such agreements shall be made on a nondiscriminatory basis. Such agreements may include provisions to prevent the potential for arbitrage.

(3) Rates for purchases of nonfirm power may, at the option of the qualifying facility, be based on the full cost at the time of delivery of decremental energy that would have been incurred by the electric utility had the qualifying facility not been in operation.

(A) The following factors should be considered in the calculation of the cost of decremental energy:

(i) fuel costs;

(ii) variable operating and maintenance costs;

(iii) line losses;

(iv) heat rates;

(v) cost of purchases from other sources;

(vi) other energy-related costs;

(vii) capacity costs, if, as a class, qualifying facilities providing nonfirm energy offer some predictable capacity; and

(viii) for short term energy purchases, the time and quantity of energy furnished.

(B) If practical, the avoided cost should be determined by calculating by time period, using the utility's economic dispatch model (or comparable methodology), the difference between the cost of the total energy furnished by both the qualifying facility and the utility, computed as though the energy furnished by the qualifying facility had been furnished by the utility, and the actual cost of energy furnished by the utility.

(C) The economic dispatch model should take into consideration the following factors:

(i) fuel costs;

(ii) variable operating and maintenance costs;

(iii) line losses;

(iv) heat rates;

(v) purchased power opportunity;

(vi) system stability; and

(vii) operating characteristics.

(D) Time periods should be hourly if the utility has an automated economic dispatch model available; otherwise the shortest reasonable time period for which costs can be determined should be used.

(E) Administrative, billing, and metering costs shall be recovered through a monthly customer charge to the qualifying facility.

(4) Rates for purchases of nonfirm power shall be based on the market price of energy at the time of sale from the QF unless other arrangements have been made in accordance with paragraph (2) of this subsection. Administrative, billing, and metering costs shall be recovered through a monthly customer charge to the qualifying facility. Such agreements may include provisions to prevent the potential for arbitrage.

(j) Periods during which purchases not required.

(1) Any PTB REP or electric utility which gives notice to each affected qualifying facility in time for the qualifying facility to cease delivery of energy or capacity to the PTB REP, or electric utility will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, including resource ramp rate limitations that could cause imbalances or the amount of energy put by the QF exceeds the PTB REP's load, purchases from qualifying facilities will result in costs greater than those which the electric utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself, provided, however, that this subsection does not override contractual obligations of the PTB REP or electric utility to purchase from a qualifying facility.

(2) Any PTB REP or electric utility which fails to give notice to each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the PTB REP or electric utility will be required to pay the same rate for such purchase of energy or capacity as would be required had the period of greater costs not occurred.

(3) A claim by PTB REP or an electric utility that such a period has occurred or will occur is subject to such verification by the commission either before or after the occurrence.

(k) Rates for sales to qualifying facilities.

(1) General rules.

(A) Rates for sales to qualifying facilities shall be just and reasonable and in the public interest, and shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility. Rates for standby or other supplementary service shall be based on the amount of capacity contracted for between the qualifying facility and the electric utility, and shall not penalize electric utilities that also purchase power from qualifying facilities. The need for and cost responsibility for special equipment or system modifications shall be determined by application of Subchapter I of this chapter.

(B) Rates for sales that are based on accurate data and consistent system-wide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the electric utility's other customers with similar load or other cost-related characteristics.

(2) Additional services to be provided to qualifying facilities.

(A) Upon request of a qualifying facility within its service area, each electric utility shall provide:

(i) supplementary power;

(ii) back-up power;

(iii) maintenance power; and

(iv) interruptible power.

(B) An electric utility shall not be required to provide supplementary power, back-up power, or maintenance power to a qualifying facility if the commission finds that provision of such power will:

(i) impair the electric utility's ability to render adequate service to its customers; or

(ii) place an undue burden on the electric utility.

(3) Rates for sales of back-up power and maintenance power. The rate for sales of back-up power or maintenance power:

(A) shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and

(B) shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

(l) System emergencies.

(1) Qualifying facility obligation to provide power during system emergencies. A qualifying facility shall be required to provide

energy or capacity to an electric utility during a system emergency only to the extent:

(A) provided by agreement between such qualifying facility and electric utility; or

(B) ordered under the Federal Power Act, §202(c).

(2) Discontinuance of purchases and sales during system emergencies. During any system emergency, an electric utility may discontinue:

(A) purchases from a qualifying facility if such purchases would contribute to such emergency; and

(B) sales to a qualifying facility, provided that such discontinuance is on a nondiscriminatory basis.

(m) Enforcement. A proceeding to resolve a dispute between an electric utility, PTB REP and a qualifying facility arising under this section may be instituted by filing of a petition with the commission. Electric utilities, PTB REPs, and qualifying facilities are encouraged to engage in alternative dispute resolution prior to the filing of a complaint.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2008.

TRD-200806654
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 8, 2009
Proposal publication date: June 20, 2008
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 59. CONTINUING EDUCATION REQUIREMENTS

16 TAC §59.3

The Texas Commission of Licensing and Regulation ("Commission") adopts an amendment to an existing rule at 16 Texas Administrative Code ("TAC"), Chapter 59, §59.3, regarding continuing education providers and courses for towing operators. The amendment is adopted without changes to the proposed text as published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8711) and will not be republished.

Texas Occupations Code, §51.405 requires the Commission to recognize, prepare, or administer continuing education programs for license holders. In response to this statutory directive, the Commission has adopted rules at 16 Texas Administrative Code, Chapter 59 to establish general requirements for continuing education providers and courses. The chapter contains rules of general applicability that currently apply to the Texas Department of Licensing and Regulation ("Department") programs listed in §59.3.

The amendment to §59.3 adds towing operators to that list. The effect of the amendment is to make the provisions of Chapter 59 apply to continuing education providers and courses for towing operators. The amendment is necessary to implement Texas Occupations Code, §2308.157, which requires the Commission by rule to recognize, prepare, or administer continuing education programs for license holders in the towing program.

The amendment will allow continuing education providers for this program to begin registering with the Department and to obtain approval for courses. The amendment is intended to work in conjunction with new rule 16 TAC §86.250, which contains specific continuing education requirements related to the towing program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. The public comment period closed on November 24, 2008. The Department did not receive any public comments on the proposed amendment to the existing rule.

The amendment is adopted under Texas Occupations Code, Chapter 51, §51.405, which requires the Commission to recognize, prepare, or administer continuing education programs for license holders, and Texas Occupations Code, Chapter 2308, §2308.157, which requires the Commission to recognize, prepare, or administer continuing education programs for license holders in the towing program. Texas Occupations Code, Chapter 51 authorizes the Commission to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2308, in particular §51.405 and §2308.157. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 23, 2008.

TRD-200806673
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 12, 2009
Proposal publication date: October 24, 2008
For further information, please call: (512) 463-7348

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CHAPTER 86. VEHICLE TOWING

16 TAC §86.250

The Texas Commission of Licensing and Regulation ("Commission") adopts a new rule at 16 Texas Administrative Code ("TAC"), Chapter 86, §86.250, regarding continuing education for towing operators. The new rule is adopted with changes to the proposed text as published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8712) and is republished.

The Towing and Storage Advisory Board ("the Board") recommended the substance of this rule at its meeting on July 8, 2008. The Commission considered the proposed rule as a discussion

item at its October 23, 2008, meeting. At that time Commission members expressed concern that the number of continuing education hours required by the proposed rule was excessive. The Board met on November 10, 2008, and considered the proposed rule again. After public testimony and discussion, the Board voted, with one dissenting vote, to recommend the rule as proposed.

Texas Occupations Code, §2308.157(a) requires the Commission by rule to recognize, prepare, or administer continuing education programs for license holders. The new rule implements this statutory provision. The rule will work in conjunction with Chapter 59 of the Commission's rules, which contains the general provisions for continuing education providers and courses. That chapter requires providers to be registered with the Texas Department of Licensing and Regulation ("Department") and courses to be approved by the Department. Providers will become part of the Department's electronic system for notifying the Department of course completion.

As a companion to this new rule at 16 TAC §86.250, the Commission also adopted an amendment to 16 TAC §59.3 which added the towing program to the coverage of Chapter 59.

The new rule requires a towing operator to complete four hours of continuing education in Department-approved courses to renew the operator's license. The continuing education hours must include one hour of roadway safety, one hour of law and rules, and the remaining two hours may be in any of the specified topics, including roadway safety or law and rules. The continuing education hours must be completed during the term of the current license or, in the case of a late renewal, within the one-year period prior to the date of renewal. A licensee may not receive credit for attending the same course more than once. A registrant is required to retain a copy of the certificate of completion for two years after the date of completion of the course.

Courses must be approved by the Department under procedures prescribed by the Department. To be approved by the Department, a provider's course must be dedicated to instruction in one or more of the topics listed in subsection (g). A course may be offered until the expiration of the course approval (which is one year) or until the provider ceases holding an active provider registration, whichever occurs first. The provider must pay a $5 record fee to the Department for each licensee who completes a course for continuing education credit.

Texas Occupations Code, §2308.157(c) requires that to renew an incident management towing operator's license the first time, the licensee must complete a one-time professional development course related to towing that is licensed or certified by the National Safety Council or another course approved and administered by the Department under this section. Subsection (j) of the new rule implements this statutory provision. The Department understands that the National Safety Council does not actually license or certify such a course; however, the rule specifies "another course" that the Department will approve for this purpose. After considering public comments, the Commission adopts the rule with changes to the specific course requirements listed in the proposed rule.

The one-time professional development course must be 8 hours, consisting of at least 2 hours of classroom training and 2 hours of live demonstration and hands-on training. The remaining hours may consist of any combination of classroom training and live demonstration and hands-on training. The rule specifies the topics that must be covered. Finally, the course must be offered by or through an approved provider, including a community college, college, or university. This differs from the proposed rule by not requiring the course to be offered by or through a community college, college, or university. A corresponding change to subsection (l) was necessary to clarify that a course taken prior to the effective date of the rule need not have been offered by an approved provider.

The new rule applies to licensees, providers, and courses upon the effective date of the rule.

Subsection (l) relates to the 8-hour, one-time professional development course required under subsection (j) and allows a licensee to receive credit for such a course that was completed prior to the effective date of the rule. In that situation, the provider would not have to have been registered with the Department and the course would not have to have been approved by the Department for the licensee to receive credit. The licensee must furnish a certificate of completion or other evidence satisfactory to the Department of completion of the course. Beginning on the effective date of the rule, however, providers will need to register with the Department and have the course approved by the Department in order for licensees to receive continuing education credit.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. The public comment period closed on November 24, 2008. The Department received numerous comments on the proposed rule. Below is a summary of the comments and the Department's responses to the comments.

Public Comments Received During November 10, 2008, Advisory Board Meeting

During the November 10, 2008, meeting of the Towing and Storage Advisory Board (TASAB), the TASAB received public comments from: Frankie Garcia, Dan Messina, Tommy Anderson, Larry Cernosek, Rhonda Hight, Jess Horton, Michael Nealpool, Rose Goode, Don McClure, and Eric Golbow. The comments received during the November 10, 2008, TASAB meeting were in substance identical to those submitted in writing. Therefore, responses to the oral comments received during the November 10, 2008, TASAB meeting are addressed in the section addressing written comments.

Written Comments

Two-hundred and thirty-three written comments were timely received by the Commission. The written comments fall into two groups. The first group consists of non-survey related comments. The second group consists of survey related comments.

Non-survey related comments

The Commission received thirty-three non-survey related comments submitted by the following: Joseph D' Ortenzio, Abba Training, Ron Burns, Towing Experts, Fred Shannafelt, Shannafelt Auto, Phil Martin, Phil's Automotive, Olan Benge, Poor Farms, William E. Beaty, Beaty's Repair and Wrecker Service, Mobile City Wrecker of San Antonio, Oscar Garza, Craig Zale, Craig's Car Care, Suzanne Poole, Houston Professional Towing Association, Cody Leifer, Crow Towing, Dale Waltrip, Kennington Wrecker Service, Peter Poze, LADS Wrecker Service, Tiffani Whitehead, Underwood Garage & Wrecker Service, Brent Rowland, Diamond Service Center, John Tazman, Rick Stevenson, Texas Auto Carriers, Jim Fuller, Fuller Towing & Recovery, Jeni Ferril, T. Miller, Inc., John Payette, Superior Wrecker Service, Euna Payette, Superior Wrecker Service, Leaonard Leifer, Dan

Messina, Southwest Tow Operators, Joann Messina, Southwest Tow Operators, Abilene Auto Wrecking, Gregg Killingsworth, Larry Jackson, Sandra Toman, Jimmy (emaill address provided), Ron Burnes, Donald Cypert, Johnny Crawford, Vince McCurley, Berto Torres, Eric Golbow, Texas Towing and Storage Association, Cathy Ackeman, Mesilla Winwood, Victor Blanco, Courtiss Himes, and Jim Quinte, Automobile Parts & Services Association.

Two commenters correctly observed that the 18-hour professional development course in proposed new §86.250 is not an annual requirement and does not apply to every licensed tow operator. The commenter points out that the requirements of §86.250 are limited to licensed Incident Management operators and only apply to the first license renewal. The Commission agrees with this commenter and further clarifies that §86.250 addresses both professional development (applicable only to Incident Management tow operators) and continuing education (applicable to all tow operators). The Commission further clarifies that the professional development course is designed specifically to address advanced towing techniques not ordinarily encountered by private property and consent tow operators. The Commission emphasizes that the professional development course is not the same as continuing education and the terms are therefore not interchangeable.

One commenter suggested that continuing education follow the same standards as other programs administered by the Department. The Commission agrees with this comment and believes the four hours of continuing education stated in the published rule and the requirements of the adopted rule follows and is consistent with the requirements of existing programs administered by the Department.

Some commenters request the Commission create exemptions for "not for hire trucks", while others suggest grandfathering experienced tow operators or those issued a license by the Department before a certain date. The Commission declines to change the published rule in response to these comments. First, the term "not for hire trucks" is neither a statutory or regulatory term. Moreover, the published rule is applicable to tow operators and does not apply to trucks. Second, grandfathering experienced drivers is ambiguous at best. The comment equates longevity as a tow operator with qualifications. That assumption may or may not be correct. Finally, grandfathering tow operators based on an arbitrary future date could allow untrained and unqualified tow operators to quickly receive an Incident Management license without benefit of a professional development course, endangering the public and frustrating the legislative purpose to license qualified Incident Management tow operators.

One commenter states that tow drivers should not have more training than electricians who perform far more dangerous functions. The Commission agrees with this comment and notes that under the published or adopted rule, Incident Management tow operators are not required to have more training than electricians. Electricians are licensed by type. Similarly, tow operators are licensed by type. The lowest type of electrician's license and the lowest type of tow operator's license do not require professional development. However, the more advanced the license, the more professional development is required. An advanced electrician's license requires hundreds of hours of professional development via the apprentice program. On the other hand, under the published rule and the rule as adopted, an advanced Incident Management tow operator's license requires fewer than twenty hours of professional development.

Several commenters object to the requirement that professional development be conducted by or through a community college, college, or university. They argue that small towns may not have community colleges and those with them may not have qualified instructors. Some commenters suggest that college level instruction will inflate the costs of training. One commenter suggested that the professional development course be conducted over the internet in lieu of community colleges. In response to these commenters, the Commission changed the rule to eliminate the requirement that the professional development course be offered in conjunction with a university or community college.

While some commenters acknowledge that some training is necessary; many suggest that 18 hours is too much for continuing education and suggest that number be reduced between four to eight hours. Those commenters asked the Commission to consider costs on smaller companies along with costs to comply with other licensing requirements and operating costs not related to continuing education. One commenter supported keeping the 18-hour professional development course and increasing the continuing education requirement from four hours to eight hours. Another commenter suggested that continuing education be set between four to six hours. One commenter noted that tow operators often have more than one place of employment and may receive safety training from multiple sources outside of their towing experience. One commenter argues that the continuing education rule will have an effect on small business because if drivers are away from work attending class they earn less. The same commenter recommended reducing the professional development course from eighteen to twelve hours and eliminating the fee paid by continuing education providers. While the proposed rule never required 18-hours of continuing education, in response to these commenters, the Commission changed the rule to reduce the number of hours of the professional development course from 18 to 8 hours.

Many commenters supported keeping the 18-hour professional development course with 6 hours of hands on training as published because it is the industry standard and represents the minimum amount of training necessary to ensure operator safety and further improve industry professionalism. The Commission disagrees with these comments because it believes that 8 hours is a sufficient minimum requirement for the course. A commenter suggested that the 4 hours of continuing education should not be approved until the Department conduct research to confirm that four hours is appropriate. The Commission disagrees and believes that it is necessary to move forward with a continuing education rule to comply with statutory requirements.

In response to other comments, the Commission reduced the number of hours for the professional development course from 18 to 8-hours. In doing so, the Commission reserves the right to revisit this issue and addresses any issues regarding this professional development course approved in these rules.

Several commenters suggested that continuing education include training in first aid, roadside safety, practices and procedures, equipment use and deployment, hazardous material identification, transportation code, and storage lot rules and regulations. The Commission believes that the course requirements of the professional development course offer providers the flexibility to teach the courses suggested by these commenters.

Several commenters questioned whether the Department would credit prior certification training toward completion of the 18-hour professional development course. The rule as published and

adopted provides an opportunity for tow operators to request approval of professional development courses meeting the requirements of this rule.

One commenter suggested that continuing education is a hidden tax that will only increase over time. Another commenter suggested that continuing education be required of just those tow operators with traffic violations on their driving record. One commenter stated that training should have been required before issuing the tow operator license. In response to these comments, the Commission notes that the training required by this rule is mandated by statute.

Survey related comments

The Commission received two hundred comments submitted on a survey form prepared by the Texas Towing & Storage Association. Survey form comments were received from: Peter Pell, Sharla Cole, Mike Neal Pool, TK Thompson, Joe Tuckor, Jerry Pieper, Donald Cain, Dolly Patke, Bill Sharp, Lean Mewborn, Edward Bumstead, Gino Caprile, Jimmie White, Randall Holt, Phillip Gore, Carroll Cox, Victor Lopez, Matthew Armstrong, Matt Armstrong, Irvin Menokle, Duane Pittman, John Skinner, Frank Meeham, Norman Dulong, Jay Cockran, Craig Stowis, Darel Beene, Joe Hill, Barry Falkner, Larry Cernosek, Jeni Ferril, David Pickrell, Winston Cox, Glen Hays, Kenneth and Donnie Bellar, Jan Banet, Eddy Merchant, Billy Seanster, Adan Garza, Randy Smith, Carolyn Janek, TL Sebatain, Tom Hooker, Ralph Long, Cory Colyer, Ken Stevenson, Johnny Peoples, Lee & David McBroom, Joe Dees, Ashton Laursen, Asker Payne, Scott Pakiz, HB Robert, Leslie Meyer, Ronnie Pelt, James Griffin, Erbie Voyles, Jimmy Marion, Tommy Daves, Brent Rowland, Vicky Toliver, David Richardson, Cecil Mahoney, Richard Gilleaux, Keith Helms, Bobby Hennis, Lee & Thersa McClary, Thomas Cronston, Erica Hendrickson, Alexander Bauricah, Nancy Noska, Michael Noska, Bob Johnsone, John Walker, Craig Zale, Rayford Eagars, Ray Eagars, D. Gregar Arons, Phil Martin, Charles Hice, Charles Walls, Rick Anastasi, Laura Anastasi, Johnny Adamick, George Whatley, Barry Black, Gary Howard, Mike Steelman, Rod Haycock, David Matoke, Larry Cromley, Evertt Johnson, Darrel McGinnis, David Anastasi, Clarence Thomas, Mike Muzyka, Tim Oyleshy, Damon Terry, Judy Scott, Keith Lafollett, James Parker, James Milner, Billy Wooten, Rick Ruback, Joel Barlow, Mike Sutton, John Hall, Joe Key, Jacob Cox, Pat Crow, Rick Morles, Kimberly Schmoyer, Steve Brundidge, James Hrabovsky, Michael Liggie, Mark Cochrum, Vicent Liggio, Jasper Liggio, Mark Morgan, Anthony Falco, Charlie Reddin, Steven Parker, Collin Jelteil, Herman Niesweiolony, Michael Welch, Richard Beluin, Manuel Guajardo, Ronnie McCollough, Magdaleno Zapata, Charles Carroll, Thomas McCain, Hugh McCain, Robert East, Bill Clark, Joel Franklin, Sharayla Jones, Lewis Clark, Cecil Baker, Joe Whitney, Cornelius Ikwmezunma, Fred Britton, Bryant Ratliff, Jesse Simpson, Tony Gonzales, David Davis, Hector Garcia, Pat Scanlin, Jeffrey Anastasi, John Zengler, Raymond May, Emzell Jones, Paul Perry, David Olivarez, Frank Mostens, Steve Cole, Enrique Avila, Roy Rodriguez, Lonenzo Gonzales, Phil Bridges, Bob Edwards, Roy Gillie, Roy Long, Robert Savage, Anna Hill, David Boles, Erma Boles, Jonathan Arreola, LJ Boles, Emmanuel Arreola, Mark Boles, Wayne Powers, Jose Alonso, Paul Johnson, Chad Keesling, Bobby Melton, John Westfall, Jim Gossett, Bill McKnight, James Burren, Gary Meuth, Jason Adamick, Jesse Tanne, Vernon Waltman.

The Texas Towing & Storage Association survey form contained the following five propositions: (1) Do you feel 18 CE hours is/is not a great benefit to every driver; (2) Is hands on training necessary to ensure that every driver understands the safety aspect of towing; (3) I have/have not been in formal training class and I learned; (4) I ask the board to/to not change the rule; and (5) I strongly agree/disagree that every tower needs to be Trained the full 18 hours with hands-on training.

In response to survey proposition 1, the Commission notes that neither the published rule nor adopted rule requires "every driver to complete 18 CE hours" as stated in the form survey. Likewise, in response to survey proposition 2, neither the published rule nor adopted rule requires hands-on training for "every driver." Similarly, in response to survey proposition 5, neither the published rule nor adopted rule requires every tow operator "be [t]rained the full 18 hours with hands-on training."

With respect to survey proposition 4, the Commission notes that of the 200 survey responses, 81 responders supported a change to the published rule, while 75 did not. Not all survey responses responded to this proposition. The Commission assumes that the change to the rule relates to the professional development course or the number of continuing education hours. As stated in various sections of this preamble, the Commission adopts the new rule with changes to the proposed rule.

While survey proposition 4 inquired about whether the commenter attended formal training, many commenters used the proposition as an open forum to express a host of opinions.

One commenter notes he attended formal training and learned proper accident scene, staging, up-righting all size vehicles, increasing mechanical advantage thru snatch blocks, redirect angle of pull to minimize traffic disruption, on scene communication before, during and after a recovery, dispatching crucial equipment to expedite scene clearance, how to work with multiple agencies, hazardous materials, and safety clothing. As stated earlier, the Commission believes that the professional development and continuing education requirements have enough flexibility to include these topics.

Several commenters state that some towing companies already hold safety meetings and the additional training is unnecessary. While applauding companies voluntarily providing safety training to tow operators, by statute, the Commission is required to establish minimum training requirements. In reducing the number of hours for the professional development course, the Commission recognizes the efforts of some companies and at the same time impose a minimum standard on others.

Many experienced tow operators commented that a new tow operator or those with less than five years experience should be trained but not in a college setting. The Commission does not adopt the assumption that experience or longevity equals proper training and therefore declines to grandfather tow operators.

One commenter suggests that continuing education is just another expense without benefit to tow operators. The Commission disagrees with this commenter because properly trained tow operators benefit not only the towing industry but the citizens of the State of Texas.

One commenter suggested that the professional development course be part of the American Traffic Safety Services Association incident traffic control training for responders. The Commission notes that nothing in the published or adopted rule prevents the American Traffic Safety Services Association from seeking approval of its training course for approval by the Department.

Some commenters believe that consent towing is not a science and that with the correct driver's license a person should be allowed to get a tow operator's license because tow trucks are simple to operate. Without comment on the complexity or simplicity of the different types of tow trucks, the Commission notes its statutory obligation to provide both professional development and continuing education for tow operators.

Several commenters recognize that tow operators performing heavy recovery tows require more training than those performing light tows. Comments also observe that a one size does not fit all tow operators. They conclude by suggesting that different type tow operators should be subject to different continuing education requirements. The Commission agrees with these commenters and believes that the statutory requirement that only Incident Management tow operators complete professional development course takes this distinction in levels of training into consideration.

Some commenters suggest that safety training will not prevent injury to tow operators because they are killed or injured by drunk drivers or inattentive drivers passing the accident scene. Some of those commenters suggest that programs be implemented to educate the public; while other commenters advocate passage of a "move over" law. Without comment on the merits of the arguments, the Commission notes that it is without jurisdiction to implement the requested actions.

One commenter states that an 18 hour class does not guarantee safety. The Commission acknowledges that regulations do not come with guarantees. However, the professional development course and the continuing education requirements represent measures that will result in incremental safety improvements.

Some commenters believe that professional development and continuing education should be voluntary. Others argue that companies be allowed to train employees or that somehow internal safety meetings be substituted for the training required by statute. The Commission acknowledges its statutory obligation to implement a mandatory professional development course and continuing education program. Therefore, it is inappropriate to delegate this solely to voluntary and in-house training.

Several commenters asked that towers engaged in repossession activity be classified differently from other types of tow operators. The Commission notes that while repossession towing is a subgroup of the towing industry they are also consent tow operators. Under the published and adopted rules, consent towers are only required to complete four hours of continuing education.

Many commenters assert that they have decades of experience along with common sense and should be grandfathered from the professional development course and the continuing education requirements. As the Commission previously concluded, this comment equates longevity as a tow operator with qualifications. That may or may not be correct and the Commission declines to adopt the assumption.

Some commenters believe that 18 hours is a fraction of the time needed for training. Another commenter questioned why auctioneers are required to have a hundred hours of training as opposed to only 18-hours for Incident Management tow operators. The Commission believes there are sufficient differences between the two industries to justify different levels of training.

One commenter asserts that tow operators with Department-approved certification be exempt from additional training requirements. The Commission declines to create this exemption because both levels of training are required by statute.

Several commenters suggested that training be in the form of video and other study materials that do not require travel or other expenses. One commenter complained that training costs will exceed $500 per person. Another commenter requested that training be provided in Spanish. Based on other written and oral comments, the Commission believes that a large segment of the industry will greatly benefit from hands-on training. Therefore, the Commission finds that professional development training solely by video is inappropriate. The Commission also believes that providers will meet market needs to offer professional development training in Spanish.

Some commenters state that training provides an opportunity to discover safety issues not otherwise thought about and increases driver confidence and communication to the company about equipment needs. Many commenters believe that hands-on-training is very important to members of the towing industry. The Commission agrees with these commenters and the adopted rule retains the hands-on approach while offering flexibility to offer topics that instill confidence in operators leading to a safer towing industry.

One commenter suggested that tow companies with trucks registered with the United States Department of Transportation (USDOT) be exempt from the professional development course and continuing education because the USDOT already requires training. This same commenter suggested that consent towing is contractual in nature and that unsafe operation of tow trucks can be addressed through civil litigation. The Commission understands that USDOT training is a proposal without implementation. Nevertheless, the Commission believes that the training requirements imposed by this rule are only applicable to tow operators holding a TDLR tow operator license. The Commission also believes that leaving matters of safety to civil litigation is not a reasonable solution.

One commenter stated that tow operators are first responders and need the 18 hour professional development course to ensure the safety of other first responders working an accident scene. This commenter believes that watching an 8-hour video is insufficient to adequately train a tow operator; as opposed to the hundreds of hours of training required of other first responders. This commenter argues that the 18-hour professional development course in the published rules should be adopted because it is similar to the course offered by the International Institute of Towing and Recovery program which is mandatory for tow operators with the Harris County Road Authority. The Commission agrees that a professional development course should include more than watching an eight hour video. The rule as adopted requires hands-on training. Moreover, the rule establishes the minimum standard for training an Incident Management tow operator. Nothing in the rule prevents a tow operator from participating in more than the 8-hour course. Also, nothing prevents Harris County or a towing company from requiring more professional development hours from Incident Management tow operators.

Late filed Comments

The following persons late filed comments which were received after the November 24, 2008, deadline for submitting comments: Charlane Meyer, Ken W. Ulmer, Mark Miller, Frank Lozano, Catherine Creamer, Todd Stowe, Donald Creamer, Robert Dennis, Eric Lawrence, Donald Govan, Mark Hardy,

Oscar Escobar, Henry Hernandez, Sonia Lopez, Billy Jones, Perfecta Dela Rosa, Vince Mclury, Bobby Hranicky, Grace Gonzalez, David Gonzalez, Jesse Lemos, James Simmons, Randall Robinson, Patricia Lemos, Jay Mueller, Louis Maples, Earl Yahn, Danny, Byncton, Robert Chote, David Kitz, Donna cook, Pete Johnson, Garrison Maurer, GT Morton, AJ Franklin, Joe Wilson, Timothy Prasifka, Robert Fleming, Dowant Govan, and Anastasi Automotive.

The late filed comments were in substance identical to those submitted in writing and timely filed. Therefore, responses to the late filed comments are addressed in the section addressing written comments.

The new rule is adopted under Texas Occupations Code, Chapter 2308, in particular §2308.157, and Texas Occupations Code, Chapter 51. These chapters authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 2308, and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adoption.

§86.250. License Requirements--Towing Operator Continuing Education.

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title, unless the context indicates otherwise.

(b) To renew a towing operator license, a licensee must complete a total of 4 hours of continuing education through Department-approved courses. The continuing education hours must include the following:

(1) 1 hour in roadway safety;

(2) 1 hour in Texas law and rules that regulate the conduct of towing operators; and

(3) 2 hours in any topic listed in subsection (g), including subsection (g)(1) and (g)(2).

(c) For a timely renewal, the continuing education hours must have been completed within the term of the current license. For a late renewal, the continuing education hours must have been completed within the one-year period immediately prior to the date of renewal.

(d) A licensee will not receive continuing education hours for attending the same course more than once.

(e) A licensee will receive continuing education hours for only those courses that are approved by the Department, under procedures prescribed by the Department.

(f) A licensee must retain a copy of the certificate of completion for a course for two years after the date of completion. In conducting any inspection or investigation of the licensee, the Department may examine the licensee's records to determine compliance with this subsection.

(g) To be approved by the Department under Chapter 59 of this title, a provider's course must be dedicated to instruction in one or more of the following topics:

(1) Texas law and rules that regulate the conduct of towing operators;

(2) roadway safety;

(3) driver safety;

(4) towing techniques;

(5) equipment operation and safety; and

(6) customer service and documentation.

(h) A Department-approved course may be offered until the expiration of the course approval or until the provider ceases to hold an active provider registration, whichever occurs first.

(i) A provider shall pay to the Department a continuing education record fee of $5 for each licensee who completes a course for continuing education credit. A provider's failure to pay the record fee for courses completed may result in disciplinary action against the provider, up to and including revocation of the provider's registration under §59.90 of this title.

(j) To renew an incident management towing operator's license the first time, a licensee must complete, in lieu of the requirements stated in subsections (b), (c), and (g), a professional development course relating to towing that:

(1) consists of at least 8 hours of training, of which:

(A) at least 2 hours are live demonstration and hands-on training;

(B) at least 2 hours are classroom training; and

(C) any remaining hours are classroom training or live demonstration and hands-on training;

(2) is dedicated to instruction in the following topics:

(A) how light-duty tow trucks work;

(B) towing with a wheel lift;

(C) towing with a tow sling;

(D) using tow dollies;

(E) car carrier operation;

(F) vehicle recovery;

(G) light-duty tow trucks;

(H) field procedures;

(I) vehicle maintenance; and

(J) safety; and

(3) is offered by or through a Department-approved provider, including a community college, college, or university.

(k) This section shall apply to licensees, providers, and courses upon the effective date of this section.

(l) Notwithstanding any other provision of this section or Chapter 59 of this title, a licensee may receive credit under subsection (j) for a course that the licensee completed before the effective date of this section if:

(1) the course satisfies the requirements of subsection (j)(1) and (j)(2); and

(2) the licensee furnishes to the Department a certificate of completion or other evidence satisfactory to the Department of completion of the course.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 23, 2008.

TRD-200806674
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 12, 2009
Proposal publication date: October 24, 2008
For further information, please call: (512) 463-7348

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 289. RADIATION CONTROL
SUBCHAPTER F. LICENSE REGULATIONS

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) adopts the repeal of §289.256 and new §289.256, concerning medical and veterinary use of radioactive material. New §289.256 is adopted with changes to the proposed text as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5470). The repeal of §289.256 is adopted without changes and will not be republished.

BACKGROUND AND PURPOSE

The repeal and new §289.256 are necessary to comply with compatibility requirements of the United States Nuclear Regulatory Commission (NRC). The repeal and new rule are the result of the NRC's adoption of training and education requirements for users of radioactive material for medical purposes. These include physicians, medical physicists, nuclear pharmacists, and radiation safety officers. Texas is an agreement state, which means the state has an agreement with the NRC under which the NRC has relinquished control over the majority of radioactive material uses in Texas. However, Texas must maintain certain rules compatible with the NRC.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.256 has been reviewed and the department has determined that reasons for adopting the section continues to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The majority of the additional language in the new §289.256 is new training, education and use requirements for users of radioactive material for medical purposes. These users include physicians, medical physicists, nuclear pharmacists, and radiation safety officers. The other changes include the following; additional language is added to §289.256(q) concerning requirements for emerging technologies in medical uses of radioactive material that are not specifically addressed in this section, additional language is added to §289.256(u) to clarify the types of sealed sources or devices that licensees may use in medicine, and additional language is added in §289.256(dd) to provide licensing and operating requirements for mobile nuclear medicine services. Due to the additions and realignment of §289.256, renumbering occurred.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were individuals. The commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments.

Comment: Concerning §289.256 in general, a commenter stated that all of the state regulations for medical use need to be formatted like the veterinary rules (explanation/clarification on the left side of the page) located on the department's website at http://www.dshs.state.tx.us/radiation/rules.shtm. In addition, the commenter added that the regulations are written in legal terms and have become so long and complex that it is difficult to know what needs to be done to remain in compliance.

Response: The commission acknowledges the comment. The dental and veterinary radiation control rules referenced at §289.232 of this title (relating to Radiation Control Regulations for Dental Radiation Machines) and §289.233 of this title (relating to Radiation Control Regulations for Radiation Machines Used in Veterinary Medicine) were developed as a result of requests from a majority of the x-ray registrants. The formatting of these rule sections, which include shaded areas for new revisions and explanation of rule text was very resource intensive. The department has not received the same type and number of requests for this new rule. No change was made to the rule as a result of the comment.

Comment: Concerning §289.256 in general, a commenter expressed that it is impossible to identify the proposed added and changed text to the proposed rule changes and asked if the color of the added/changed text presented on the Radiation Control web site could be changed.

Response: The commission acknowledges the comment; however, the department must submit proposed and adopted rules that comply with the *Texas Register* format for publication. Due to the extensive and complex changes made for this rule revision, the repeal of the entire existing rule text and replacement with the new rule text were necessary for publication of the rule in the *Texas Register.* As a courtesy to licensees and registrants, when possible, the program will shade/highlight the text that is made available on the Radiation Control web site, but the shading of changes is not prepared for repeals and new rules when much of the text has been extensively changed, renumbered, reformatted, etc. No change was made to the rule as a result of the comment.

The department staff on behalf of the commission provided comments and the commission has reviewed and agrees to the following changes.

Change: Concerning §289.256(c)(28)(B), (h)(5), (cc)(1), (ff)(2)(B), (hh)(2)(B), (oo)(3), and (pp)(3), minor revisions were made to comply with the *Texas Register* formatting requirements, correct rule reference citations, and clarify grammatical correctness.

Change: Concerning §289.256(f)(5), the department deleted the word "storage" before "facility" to clarify that the requirement applies to facilities used for storage and/or use of radioactive material.

Change: Concerning proposed §289.256(l)(2) and (4), the department deleted these paragraphs to avoid duplication of requirements already stated in §289.256(l)(1) and new renumbered §289.256(l)(2).

Change: Concerning §289.256(t)(1), the department added the word "any" before "administration of sodium iodide I-131" and added "administration of" before both "any therapeutic dosage of unsealed" and "any therapeutic dose of radiation" for consistency and clarification. The changes are to clearly identify that a written directive must be dated and signed prior to any of the three circumstances.

Change: Concerning §289.256(y)(1) and (2), the department deleted the words "by a person licensed in accordance with §289.252 of this title" after "distributed" and replaced them with "in accordance with a license issued by the agency, NRC, or another agreement state and" to clarify that the license can also be issued by the NRC or another agreement state and not just the department.

Change: Concerning §289.256(hhh)(6)(C), the department added the words "and teletherapy units" after both instances of "radiosurgery units" to clarify that although the NRC comparable rule does not include teletherapy units, Texas chooses to add teletherapy units to this subparagraph because it continues to license teletherapy units.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules as adopted have been reviewed by legal counsel and found to a be valid exercise of the agencies' legal authority.

25 TAC §289.256

STATUTORY AUTHORITY

The repeal is adopted under Health and Safety Code, §401.051, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to the control of radiation; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806702
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 18, 2009
Proposal publication date: July 11, 2008
For further information, please call: (512) 458-7111 x6972

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25 TAC §289.256

STATUTORY AUTHORITY

The new section is adopted under Health and Safety Code, §401.051, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to the control of radiation; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rule implements Government Code, §2001.039.

§289.256. Medical and Veterinary Use of Radioactive Material.

(a) Purpose. This section establishes requirements for the medical and veterinary use of radioactive material and for the issuance of specific licenses authorizing the medical and veterinary use of radioactive material. Unless otherwise exempted, no person shall receive, possess, use, transfer, own, or acquire radioactive material for medical or veterinary use except as authorized in a license issued in accordance with this section. A person who receives, possesses, uses, transfers, owns, or acquires radioactive material prior to receiving a license is subject to the requirements of this chapter.

(b) Scope.

(1) In addition to the requirements of this section, all licensees, unless otherwise specified, are subject to the requirements of §289.201 of this title (relating to General Provisions for Radioactive Material), §289.202 of this title (relating to Standards for Protection Against Radiation from Radioactive Materials), §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), §289.252 of this title (relating to Licensing of Radioactive Material), and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

(2) Veterinarians who receive, possess, use, transfer, own, or acquire radioactive material in the practice of veterinary medicine shall comply with the requirements of this section except for subsections (d), (dd) and (uuu) of this section.

(c) Definitions. The following words and terms when used in this section shall have the following meaning unless the context clearly indicates otherwise.

(1) Address of use--The building or buildings that are identified on the license and where radioactive material may be prepared, received, used, or stored.

(2) Area of use--A portion of an address of use that has been set aside for the purpose of preparing, receiving, using, or storing radioactive material.

(3) Authorized medical physicist--An individual who meets the following:

(A) the requirements in subsections (j) and (m) of this section; or

(B) is identified as an authorized medical physicist or teletherapy physicist on one of the following:

(i) a specific medical use license issued by the agency, the United States Nuclear Regulatory Commission (NRC), an agreement state, or licensing state;

(ii) a medical use permit issued by an NRC master material licensee;

(iii) a permit issued by an NRC, agreement state, or licensing state broad scope medical use licensee; or

(iv) a permit issued by an NRC master material license broad scope medical use permittee; and

(C) holds a current Texas license under the Medical Physics Practice Act, Texas Occupations Code, Chapter 602, in therapeutic radiological physics for uses in subsections (rr) and (ddd) of this section.

(4) Authorized nuclear pharmacist--A pharmacist who meets the following:

(A) the requirements in subsections (k) and (m) of this section; or

(B) is identified as an authorized nuclear pharmacist on one of the following;

(i) a specific license issued by the agency, the NRC, an agreement state, or licensing state that authorizes medical use or the practice of nuclear pharmacy;

(ii) a permit issued by an NRC master material licensee that authorizes medical use or the practice of nuclear pharmacy;

(iii) a permit issued by the agency, the NRC, an agreement state, or licensing state licensee with broad scope authorization that authorizes medical use or the practice of nuclear pharmacy; or

(iv) a permit issued by an NRC master material license broad scope medical use permittee that authorizes medical use or the practice of nuclear pharmacy;

(C) is identified as an authorized nuclear pharmacist by a commercial nuclear pharmacy that has been authorized to identify authorized nuclear pharmacists; or

(D) is designated as an authorized nuclear pharmacist in accordance with §289.252(r) of this title; and

(E) holds a current Texas license under the Texas Pharmacy Act, Occupations Code, Chapters 551 - 566, 568, and 569, as amended, and who is certified as an authorized nuclear pharmacist by the Texas State Board of Pharmacy.

(5) Authorized user--An authorized user is defined as follows:

(A) for human use, a physician licensed by the Texas Medical Board; or a dentist licensed by the Texas State Board of Dental Examiners; or a podiatrist licensed by the Texas State Board of Podiatric Medicine who:

(i) meets the requirements in subsections (m), (gg)(1), (jj)(1), (nn)(1), (oo)(1), (pp)(1), (zz)(1), (ccc)(1) or (ttt)(1) of this section; or

(ii) is identified as an authorized user on any of the following:

(I) an agency, NRC, agreement state, or licensing state license that authorizes the medical use of radioactive material;

(II) a permit issued by an NRC master material licensee that is authorized to permit the medical use of radioactive material;

(III) a permit issued by a specific licensee with broad scope authorization issued by the agency, the NRC, an agreement state, or licensing state authorizing the medical use of radioactive material; or

(IV) a permit issued by an NRC master material licensee with broad scope authorization that is authorized to permit the medical use of radioactive material.

(B) for veterinary use, an individual who is, a veterinarian licensed by the Texas State Board of Veterinary Medical Examiners; and

(i) is certified by the American College of Veterinary Radiology for the use of radioactive materials in veterinary medicine; or

(ii) has received training in accordance with subsections (gg), (jj), (oo), (pp) and (ttt) of this section as applicable; or

(iii) is identified as an authorized user on any of the following:

(I) an agency, NRC, agreement state, or licensing state license that authorizes the veterinary use of radioactive material;

(II) a permit issued by an NRC master material licensee that is authorized to permit the medical use of radioactive material;

(III) a permit issued by a specific licensee with broad scope authorization issued by the agency, the NRC, an agreement state, or licensing state authorizing the medical or veterinary use of radioactive material; or

(IV) a permit issued by an NRC master material licensee with broad scope authorization that authorizes the medical use of radioactive material.

(6) Brachytherapy--A method of radiation therapy in which plated, embedded, activated, or sealed sources are utilized to deliver a radiation dose at a distance of up to a few centimeters, by surface, intracavitary, intraluminal, or interstitial application.

(7) Brachytherapy sealed source--A sealed source or a manufacturer-assembled source train, or a combination of these sources that is designed to deliver a therapeutic dose within a distance of a few centimeters.

(8) High dose-rate remote afterloader--A device that remotely delivers a dose rate in excess of 1200 rads (12 gray (Gy)) per hour at the point or surface where the dose is prescribed.

(9) Institutional Review Board (IRB)--Any board, committee, or other group formally designated by an institution and approved by the United States Food and Drug Administration (FDA) to review, approve the initiation of, and conduct periodic review of biomedical research involving human subjects.

(10) Low dose-rate remote afterloader--A device that remotely delivers a dose rate of less than or equal to 200 rads (2 Gy) per hour at the point or surface where the dose is prescribed.

(11) Management--The chief executive officer or other individual delegated the authority to manage, direct, or administer the licensee's activities.

(12) Manual brachytherapy--A type of brachytherapy in which the sealed sources, for example, seeds and ribbons, are manually inserted either into the body cavities that are in close proximity to a treatment site or directly in the tissue volume.

(13) Medical event--An event that meets the criteria in subsection (uuu)(1) of this section.

(14) Medical institution--An organization in which several medical disciplines are practiced.

(15) Medical use--The intentional internal or external administration of radioactive material, or the radiation from radioactive material, to patients or human research subjects under the supervision of an authorized user.

(16) Medium dose-rate afterloader--A device that remotely delivers a dose rate greater than 200 rads (2 Gy) and less than or equal to 1200 rads (12 Gy) per hour at the point or surface where the dose is prescribed.

(17) Mobile nuclear medicine service--A licensed service authorized to transport radioactive material to, and medical use of the material at, the client's address. Services transporting calibration sources only are not considered mobile nuclear medicine licensees.

(18) Output--The exposure rate, dose rate, or a quantity related in a known manner to these rates from a teletherapy unit, a brachytherapy source, a remote afterloader unit, or a gamma stereotactic radiosurgery unit, for a specified set of exposure conditions.

(19) Patient--A human or animal under medical care and treatment.

(20) Preceptor--An individual who provides, directs, or verifies the training and experience required for an individual to become an authorized user, an authorized medical physicist, an authorized nuclear pharmacist, or a radiation safety officer.

(21) Permanent facility--A building or buildings that are identified on the license within the state of Texas and where radioactive material may be prepared, received, used, or stored. This may also include an area or areas where administrative activities related to the license are performed.

(22) Prescribed dosage--The specified activity or range of activity of a radiopharmaceutical as documented in a written directive or in accordance with the directions of the authorized user for procedures in subsections (ff) and (hh) of this section.

(23) Prescribed dose--Prescribed dose means one of the following:

(A) for gamma stereotactic radiosurgery, the total dose as documented in the written directive;

(B) for teletherapy, the total dose and dose per fraction as documented in the written directive;

(C) for brachytherapy, either the total sealed source strength and exposure time, or the total dose, as documented in the written directive; or

(D) for remote afterloaders, the total dose and dose per fraction as documented in the written directive.

(24) Pulsed dose-rate remote afterloader--A special type of remote afterloading device that uses a single sealed source capable of delivering dose rates greater than 1200 rads (12 Gy) per hour, but is approximately one-tenth of the activity of typical high dose-rate remote afterloader sealed sources and is used to simulate the radiobiology of a low dose rate remote afterloader treatment by inserting the sealed source for a given fraction of each hour.

(25) Radiation safety officer (RSO)--For purposes of this section, an individual who:

(A) meets the requirements in subsections (h) and (m) of this section; or

(B) is identified as an RSO on one of the following:

(i) a specific license issued by the agency, NRC, agreement state, or licensing state license that authorizes the medical or veterinary use of radioactive material; or

(ii) a permit issued by an NRC master material licensee that authorizes the medical or veterinary use of radioactive material.

(26) Sealed source and device registry--The national registry that contains all the registration certificates, generated by both the NRC and the agreement states, that summarize the radiation safety information for sealed sources and devices and describe the licensing and use conditions approved for the product.

(27) Stereotactic radiosurgery--The use of external radiation in conjunction with a guidance device to very precisely deliver a dose to a tissue volume by the use of three-dimensional coordinates.

(28) Technologist--Technologist is defined as either of the following:

(A) in nuclear medicine, a person (nuclear medicine technologist) skilled in the performance of nuclear medicine procedures under the supervision of a physician; or

(B) in therapy, as described in subsections (rr) and (ddd) of this section, a person (radiation therapy technologist or radiation therapist) who delivers treatments of radiation therapy under the supervision of and as prescribed by an authorized user who meets the requirements of subsections (zz) or (ttt) of this section.

(29) Teletherapy--Therapeutic irradiation in which the sealed source is at a distance from the patient or human or animal research subject.

(30) Therapeutic dosage--The specified activity or range of activity of radioactive material that is intended to deliver a radiation dose to a patient or human or animal research subject for palliative or curative treatment.

(31) Therapeutic dose--A radiation dose delivered from a sealed source containing radioactive material to a patient or human or animal research subject for palliative or curative treatment.

(32) Treatment site--The anatomical description of the tissue intended to receive a radiation dose, as described in a written directive.

(33) Type of use--Use of radioactive material as specified under the following subsections:

(A) uptake, and dilution and excretion studies in subsection (ff) of this section;

(B) imaging and localization studies in subsection (hh) of this section;

(C) therapy with unsealed radioactive material in subsection (kk) of this section;

(D) manual brachytherapy with sealed sources in subsection (rr) of this section;

(E) sealed sources for diagnosis in subsection (bbb) of this section; and

(F) sealed source in a remote afterloader unit, teletherapy unit, or gamma stereotactic radiosurgery unit in subsection (ddd) of this section.

(34) Unit dosage--A dosage prepared for medical use for administration as a single dosage to a patient or human or animal research subject without any further modification of the dosage after it is initially prepared.

(35) Veterinary use--The intentional internal or external administration of radioactive material, or the radiation from radioactive material, to patients under the supervision of an authorized user.

(36) Written directive--An authorized user's written order for the administration of radioactive material or radiation from radioactive material to a specific patient or human research subject, as specified in subsection (t) of this section.

(d) Provisions for research involving human subjects.

(1) A licensee may conduct research involving human subjects only if it uses the radioactive materials specified on its license for the uses authorized on the license.

(2) The licensee may conduct research specified in paragraph (1) of this subsection provided that:

(A) the research is conducted, funded, supported, or regulated by a federal agency that has implemented the Federal Policy for the Protection of Human Subjects as required by Title 10, Code of Federal Regulations (CFR), §35.6 (Federal Policy); or

(B) the licensee has applied for and received approval of a specific amendment to its license before conducting the research.

(3) Prior to conducting research as specified in paragraph (1) of this subsection, the licensee shall obtain the following:

(A) "informed consent," as defined and described in the Federal Policy, from the human research subjects; and

(B) review and approval of the research from an IRB as required by Title 45, CFR, Part 46, and Title 21, CFR, Part 56, and in accordance with the Federal Policy.

(4) Nothing in this subsection relieves licensees from complying with the other requirements of this chapter.

(e) Implementation.

(1) If a license condition exempted a licensee from a provision of this section or §289.252 of this title on the effective date of this rule, then the license condition continues to exempt the licensee from the requirements in the corresponding provision until there is a license amendment or license renewal that modifies or removes the license condition.

(2) When a requirement in this section differs from the requirement in an existing license condition, the requirement in this section shall govern.

(3) Licensees shall continue to comply with any license condition that requires implementation of procedures required by subsections (ggg) and (mmm) - (ooo) of this section until there is a license amendment or renewal that modifies the license condition.

(f) Specific requirements for the issuance of licenses. In addition to the requirements in §289.252(e) of this title and subsections (n) - (q) of this section, as applicable, a license will be issued if the agency determines that:

(1) the applicant satisfies any applicable special requirement in this section;

(2) qualifications of the designated radiation safety officer (RSO) as specified in subsection (h) of this section are adequate for the purpose requested in the application; and

(3) the following information submitted by the applicant is approved:

(A) an operating, safety, and emergency procedures manual to include specific information on the following:

(i) radiation safety precautions and instructions;

(ii) methodology for measurement of dosages or doses to be administered to patients or human or animal research subjects;

(iii) calibration, maintenance, and repair of instruments and equipment necessary for radiation safety; and

(iv) waste disposal procedures; and

(B) any additional information required by this chapter that is requested by the agency to assist in its review of the application; and

(C) qualifications of the following:

(i) RSO in accordance with subsection (h) of this section;

(ii) authorized user(s) in accordance with subsection (c)(5) of this section as applicable to the use(s) being requested;

(iii) authorized medical physicist in accordance with subsection (c)(3) of this section;

(iv) authorized nuclear pharmacist in accordance with subsection (c)(4) of this section, if applicable; and

(v) radiation safety committee (RSC), in accordance with subsection (i) of this section, if applicable; and

(4) the applicant's permanent facility is located in Texas; and

(5) the owner of the property is aware that radioactive material is stored and/or used on the property, if the proposed facility is not owned by the applicant. The applicant shall provide a written statement from the owner or the owner's agent indicating such.

(g) Radiation safety officer.

(1) Every licensee shall establish in writing the authority, duties, and responsibilities of the RSO and ensure that the RSO is provided sufficient authority, organizational freedom, time, resources, and management prerogative to perform the following duties:

(A) establish and oversee operating, safety, emergency, and as low as reasonably achievable (ALARA) procedures, and to review them at least annually to ensure that the procedures are current and conform with this chapter;

(B) ensure that required radiation surveys and leak tests are performed and documented in accordance with this chapter, including any corrective measures when levels of radiation exceed established limits;

(C) ensure that individual monitoring devices are used properly by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made in accordance with §289.203 of this title;

(D) investigate and cause a report to be submitted to the agency for each known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter and each theft or loss of source(s) of radiation, to determine the cause(s), and to take steps to prevent a recurrence;

(E) investigate and cause a report to be submitted to the agency for each known or suspected case of release of radioactive material to the environment in excess of limits established by this chapter;

(F) have a thorough knowledge of management policies and administrative procedures of the licensee;

(G) identify radiation safety problems;

(H) assume control and initiate, recommend, or provide corrective actions, including shutdown of operations when necessary, in emergency situations or unsafe conditions;

(I) verify implementation of corrective actions;

(J) ensure that records are maintained as required by this chapter;

(K) ensure the proper storing, labeling, transport, use, and disposal of sources of radiation, storage, and/or transport containers;

(L) ensure that inventories are performed in accordance with the activities for which the license application is submitted;

(M) ensure that personnel are complying with this chapter, the conditions of the license, and the operating, safety, and emergency procedures of the licensee; and

(N) serve as the primary contact with the agency.

(2) The RSO shall ensure that the duties listed in paragraph (1)(A) - (N) of this subsection are performed.

(3) The RSO shall be on site periodically commensurate with the scope of licensed activities to satisfy the requirements of paragraphs (1) and (2) of this subsection.

(4) The RSO, or staff designated by the RSO, shall be capable of physically arriving at the licensee's authorized use site(s) within a reasonable time of being notified of an emergency situation or unsafe condition.

(5) For up to 60 days each calendar year, a licensee may permit an authorized user or an individual qualified to be an RSO to function as a temporary RSO and to perform the duties of an RSO in accordance with paragraph (1) of this subsection, provided the licensee takes the actions required in paragraph (1) of this subsection, and the RSO meets the qualifications in subsection (h) of this section. Records of qualifications and dates of service shall be maintained in accordance with subsection (www) of this section for inspection by the agency.

(h) Training for radiation safety officer. Except as provided in subsection (l) of this section, the licensee shall require the individual fulfilling the responsibilities of an RSO in accordance with subsection (g) of this section for licenses for medical or veterinary use of radioactive material to be an individual who:

(1) is certified by a specialty board whose certification process has been recognized by the agency, the NRC, or an agreement state and who meets the requirements in paragraphs (4) and (5) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation).

(A) To have its certification process recognized, a specialty board shall require all candidates for certification to:

(i) hold a bachelor's or graduate degree from an accredited college or university in physical science or engineering or biological science with a minimum of 20 college credits in physical science;

(ii) have five or more years of professional experience in health physics (graduate training may be substituted for no more than two years of the required experience) including at least three years in applied health physics; and

(iii) pass an examination, administered by diplomates of the specialty board, which evaluates knowledge and competence in radiation physics and instrumentation, radiation protection, mathematics pertaining to the use and measurement of radioactivity, radiation biology and radiation dosimetry; or

(B) To have its certification process recognized, a specialty board shall require all candidates for certification to:

(i) hold a master's or doctor's degree in physics, medical physics, other physical science, engineering, or applied mathematics from an accredited college or university;

(ii) have two years of full-time practical training and/or supervised experience in medical physics as follows:

(I) under the supervision of a medical physicist who is certified in medical physics by a specialty board recognized by the agency, the NRC, an agreement state; or a licensing state; or

(II) in clinical nuclear medicine facilities providing diagnostic and/or therapeutic services under the direction of physicians who meet the requirements for authorized users in subsections (jj) or (nn) of this section; and

(iii) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in clinical diagnostic radiological or nuclear medicine physics and in radiation safety; or

(2) meets the requirements of paragraphs (5) and (6) of this subsection and has completed a structured educational program consisting of the following:

(A) 200 hours of classroom and laboratory training in the following areas:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity;

(iv) radiation biology; and

(v) radiation dosimetry; and

(B) one year of full-time radiation safety experience under the supervision of the individual identified as the RSO on an agency, NRC, agreement state, or licensing state license or on a permit issued by an NRC master material licensee that authorizes similar type(s) of use(s) of radioactive material involving the following:

(i) shipping, receiving, and performing related radiation surveys;

(ii) using and performing checks for proper operation of dose calibrators, survey meters, and instruments used to measure radionuclides;

(iii) securing and controlling radioactive material;

(iv) using administrative controls to avoid mistakes in the administration of radioactive material;

(v) using procedures to prevent or minimize radioactive contamination and using proper decontamination procedures;

(vi) using emergency procedures to control radioactive material; and

(vii) disposing of radioactive material; or

(3) is a medical physicist who has been certified by a specialty board whose certification process has been recognized by the agency, the NRC, an agreement state, or licensing state in accordance with subsection (j)(1) of this section and has experience in radiation safety for similar types of use of radioactive material for which the licensee is seeking the approval of the individual as RSO and who meets the requirements in paragraphs (5) and (6) of this subsection; or

(4) is an authorized user, authorized medical physicist, or authorized nuclear pharmacist identified on the licensee's license and has experience with the radiation safety aspects of similar types of use of radioactive material for which the individual has RSO responsibilities; and

(5) has obtained written attestation, signed by a preceptor RSO, that the individual has satisfactorily completed the requirements in paragraph (6) of this subsection and in paragraphs (1)(A)(i) and (ii) or (1)(B)(i) and (ii), or (2), (3), or (4) of this subsection, and has achieved a level of radiation safety knowledge sufficient to function independently as an RSO for a medical use licensee; and

(6) has training in the radiation safety, regulatory issues, and emergency procedures for the types of use for which a licensee seeks approval. This training requirement may be satisfied by completing training that is supervised by a RSO, authorized medical physicist, authorized nuclear pharmacist, or authorized user, as appropriate, who is authorized for the type(s) of use for which the licensee is seeking approval.

(i) Radiation safety committee. Licensees with broad scope authorization and licensees who are authorized for two or more different types of uses of radioactive material in accordance with subsections (kk), (rr), and (ddd) of this section, or two or more types of units under subsection (ddd) of this section shall establish an RSC to oversee all uses of radioactive material permitted by the license.

(1) The RSC for licenses for medical use with broad scope authorization shall be composed of the following individuals as approved by the agency:

(A) authorized users from each type of use of radioactive material authorized on the license;

(B) the RSO;

(C) a representative of nursing service;

(D) a representative of management who is neither an authorized user nor the RSO; and

(E) may include other members as the licensee deems appropriate.

(2) The RSC for licenses for medical and veterinary use authorized for two or more different types of uses of radioactive material in accordance with subsections (kk), (rr), and (ddd) of this section, or two or more types of units in accordance with subsection (ddd) of this section shall be composed of the following individuals as approved by the agency:

(A) an authorized user of each type of use permitted by the license;

(B) the RSO;

(C) a representative of nursing service, if applicable;

(D) a representative of management who is neither an authorized user nor the RSO; and

(E) may include other members as the licensee deems appropriate.

(3) Duties and responsibilities of the RSC.

(A) For licensees without broad scope authorization, the duties and responsibilities of the RSC include, but are not limited to, the following:

(i) meeting as often as necessary to conduct business but no less than three times a year;

(ii) reviewing summaries of the following information presented by the RSO:

(I) over-exposures;

(II) significant incidents, including spills, contamination, or medical events; and

(III) items of non-compliance following an inspection;

(iii) reviewing the program for maintaining doses ALARA, and providing any necessary recommendations to ensure doses are ALARA; and

(iv) reviewing the audit of the radiation safety program and acting upon the findings.

(B) For licensees with broad scope authorization, the duties and responsibilities of the RSC include, but are not limited to, the items in subparagraph (A) of this paragraph and the following:

(i) reviewing the overall compliance status for authorized users;

(ii) sharing responsibility with the RSO to conduct periodic audits of the radiation safety program;

(iii) developing criteria to evaluate training and experience of new authorized user applicants;

(iv) evaluating and approving authorized user applicants who request authorization to use radioactive material at the facility; and

(v) reviewing and approving permitted program and procedural changes prior to implementation.

(j) Training for an authorized medical physicist. Except as provided in subsection (l) of this section, the licensee shall require the authorized medical physicist to be an individual who:

(1) is certified by a specialty board whose certification process has been recognized by the agency, the NRC, an agreement state, or a licensing state and who meets the requirements in paragraphs (3) and (4) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation). To have its certification process recognized, a specialty board shall require all candidates for certification to meet the following:

(A) hold a master's or doctor's degree in physics, medical physics, other physical science, engineering, or applied mathematics from an accredited college or university;

(B) complete two years of full-time practical training and/or supervised experience in medical physics as follows:

(i) under the supervision of a medical physicist who is certified in medical physics by a specialty board recognized by the agency, NRC, agreement state, or licensing state; or

(ii) in clinical radiation facilities providing high-energy, external beam therapy (photons and electrons with energies greater than or equal to 1 million electron volts) and brachytherapy services under the direction of physicians who meet the requirements for authorized users in subsections (zz) or (ttt) of this section; and

(C) pass an examination administered by diplomates of the specialty board that assesses knowledge and competence in clinical radiation therapy, radiation safety, calibration, quality assurance, and treatment planning for external beam therapy, brachytherapy, and stereotactic radiosurgery; or

(2) holds a post graduate degree and experience to include:

(A) a master's or doctor's degree in physics, medical physics, other physical science, engineering, or applied mathematics from an accredited college or university; and

(B) completion of one year of full-time training in medical physics and an additional year of full-time work experience under the supervision of an individual who meets the requirements for an authorized medical physicist for the type(s) of use for which the individual is seeking authorization. This training and work experience shall be conducted in clinical radiation facilities that provide high-energy, external beam therapy (photons and electrons with energies greater than or equal to 1 million electron volts) and brachytherapy services and shall include:

(i) performing sealed source leak tests and inventories;

(ii) performing decay corrections;

(iii) performing full calibration and periodic spot checks of external beam treatment units, stereotactic radiosurgery units, and remote afterloading units as applicable; and

(iv) conducting radiation surveys around external beam treatment units, stereotactic radiosurgery units, and remote afterloading units as applicable; and

(3) has obtained written attestation that the individual has satisfactorily completed the requirements in paragraphs (1)(A) and (1)(B) or (2)(A) and (2)(B) and (4) of this subsection, and has achieved a level of competency sufficient to function independently as an authorized medical physicist for each type of therapeutic medical unit for which the individual is requesting authorized medical physicist status. The written attestation shall be signed by a preceptor authorized medical physicist who meets the requirements in this subsection for each type of therapeutic medical unit for which the individual is requesting authorized medical physicist status; and

(4) has training for the type(s) of use for which authorization is sought that includes hands-on device operation, safety procedures, clinical use, and the operation of a treatment planning system. This training requirement may be satisfied by satisfactorily completing either a training program provided by the vendor or by training supervised by an authorized medical physicist authorized for the type(s) of use for which the individual is seeking authorization.

(k) Training for an authorized nuclear pharmacist. Except as provided in subsection (l) of this section, the licensee shall require the authorized nuclear pharmacist to be a pharmacist who:

(1) is certified by a specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements of paragraph (2)(C) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation). To have its certification process recognized, a specialty board shall require all candidates for certification to:

(A) have graduated from a pharmacy program accredited by the American Council on Pharmaceutical Education (ACPE) or have passed the Foreign Pharmacy Graduate Examination Committee (FPGEC) examination;

(B) hold a current, active license to practice pharmacy in the state of Texas;

(C) provide evidence of having acquired at least 4000 hours of training/experience in nuclear pharmacy practice. Academic training may be substituted for no more than 2000 hours of the required training and experience; and

(D) pass an examination in nuclear pharmacy administered by diplomates of the specialty board, that assesses knowledge and competency in procurement, compounding, quality assurance, dispensing, distribution, health and safety, radiation safety, provision of information and consultation, monitoring patient outcomes, research and development; or

(2) has completed a 700 hour structured educational program including both:

(A) 200 hours of classroom and laboratory training in the following areas:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity;

(iv) chemistry of radioactive material for medical use; and

(v) radiation biology; and

(B) supervised practical experience in a nuclear pharmacy involving the following:

(i) shipping, receiving, and performing related radiation surveys;

(ii) using and performing checks for proper operation of instruments used to determine the activity of dosages, survey meters, and, if appropriate, instruments used to measure alpha- or beta-emitting radionuclides;

(iii) calculating, assaying, and safely preparing dosages for patients or human research subjects;

(iv) using administrative controls to avoid medical events in the administration of radioactive material; and

(v) using procedures to prevent or minimize radioactive contamination and using proper decontamination procedures; and

(C) has obtained written attestation, signed by a preceptor authorized nuclear pharmacist, that the individual has satisfactorily completed the requirements in paragraph (1)(A), (B) and (C) of this subsection or this paragraph and has achieved a level of competency sufficient to function independently as an authorized nuclear pharmacist.

(l) Training for experienced RSO, teletherapy or medical physicist, authorized medical physicist, authorized user, nuclear pharmacist, and authorized nuclear pharmacist.

(1) An individual identified as an RSO, a teletherapy or medical physicist, or a nuclear pharmacist on one of the following before the effective date of this rule need not comply with the training requirements of subsections (h), (j), or (k) of this section, respectively:

(A) an agency, NRC, agreement state, or licensing state license;

(B) a permit issued by an agency, NRC, agreement state, or licensing state licensee with broad scope authorization;

(C) an NRC master material license permit; or

(D) an NRC master material license permit with broad scope authorization.

(2) An individual identified as a physician, dentist, podiatrist or veterinarian authorized for the medical or veterinary use of radioactive material and who performs only those medical or veterinary uses for which they were authorized on one of the following before the effective date of this rule need not comply with the training requirements of subsections (ff) - (ttt) of this section:

(A) an agency, NRC, agreement state, or licensing state license;

(B) a permit issued by an agency, NRC, agreement state, or licensing state licensee with broad scope authorization;

(C) an NRC master material license permit; or

(D) an NRC master material license permit with broad scope authorization.

(m) Recentness of training. The training and experience specified in subsections (h), (j), (k), (l), (ff) - (kk), (rr), (tt), (zz), (aaa), (bbb), and (ddd) of this section for medical and veterinary use shall have been obtained within the seven years preceding the date of application or the individual shall have had related continuing education and experience since the required training and experience was completed.

(n) Licenses for medical and veterinarian uses of radioactive material without broad scope authorization. In addition to the requirements of subsection (f) of this section, a license for medical and veterinarian use of radioactive material as described in the applicable subsections (ff), (hh), (kk), (rr), (bbb) and (ddd) of this section will be issued if the agency approves the following documentation submitted by the applicant:

(1) that the physician(s) or veterinarian(s) designated on the application as the authorized user(s) is qualified in accordance with subsections (gg), (jj), (nn) - (qq), (zz), (aaa), (ccc) and (ttt) of this section, as applicable;

(2) that the radiation detection and measuring instrumentation is appropriate for performing surveys and procedures for the uses involved;

(3) that the radiation safety operating procedures are adequate for the handling and disposal of the radioactive material involved in the uses; and

(4) that an RSC has been established in accordance with subsection (i)(2) of this section, if applicable.

(o) License for medical and veterinary uses of radioactive material with broad scope authorization. In addition to the requirements of subsection (f) of this section, a license for medical use of radioactive material with broad scope authorization will be issued if the agency approves the following documentation submitted by the applicant:

(1) that the review of authorized user qualifications by the RSC is in accordance with subsections (gg), (jj), (nn) - (qq), (zz), (aaa), (ccc) and (ttt) of this section, as applicable;

(2) that the application is for a license authorizing unspecified forms and/or multiple types of radioactive material for medical research, diagnosis, and therapy;

(3) that the radiation detection and measuring instrumentation is appropriate for performing surveys and procedures for the uses involved;

(4) that the radiation safety operating procedures are adequate for the handling and disposal of the radioactive material involved in the uses;

(5) that staff has substantial experience in the use of a variety of radioactive material for a variety of human and animal uses;

(6) that the full-time RSO meets the requirements of subsection (h)(2) of this section; and

(7) that an RSC has been established in accordance with subsection (i)(1) of this section.

(p) License for the use of remote control brachytherapy units, teletherapy units, or gamma stereotactic radiosurgery units. In addition to the requirements of subsection (f) of this section, a license for the use of remote control brachytherapy (RCB) units, teletherapy units, or gamma stereotactic radiosurgery units will be issued if the agency approves the following documentation submitted by the applicant:

(1) that the physician(s) designated on the application as the authorized user(s) is qualified in accordance with subsection (ttt) of this section;

(2) that the radiation detection and measuring instrumentation is appropriate for performing surveys and procedures for the uses involved;

(3) that the radiation safety operating procedures are adequate for the handling and disposal of the radioactive material involved in the uses;

(4) of the radioactive isotopes to be possessed;

(5) of the sealed source manufacturer(s) name(s) and the model number(s) of the sealed source(s) to be installed;

(6) of the maximum number of sealed sources of each isotope to be possessed, including the activity of each sealed source;

(7) of the manufacturer and model name and/or number of the following units, as applicable:

(A) RCB unit;

(B) teletherapy unit; or

(C) gamma stereotactic radiosurgery unit;

(8) that the authorized medical physicist designated on the application is qualified in accordance with subsection (j) of this section;

(9) of the successful completion of unit-specific, manufacturer-provided training that includes standard clinical and emergency procedures for remote control brachytherapy and gamma stereotactic radiosurgery units for the following personnel:

(A) authorized medical physicist of this section;

(B) technologists; and

(C) authorized user;

(10) of the safety procedures and instructions as required by subsection (ggg) of this section;

(11) of the spot check procedures as required by subsections (lll) - (nnn) of this section, as applicable; and

(12) that an RSC has been established in accordance with subsection (i)(1) or (2) of this section if applicable.

(q) License for other medical or veterinary uses of radioactive material or a radiation source approved for medical or veterinary use that is not specifically addressed in this section. A licensee may use radioactive material or a radiation source approved for medical use which is not specifically addressed in this section if the requirements of subsection (f) of this section have been met, the applicant or licensee has received written approval from the agency in a license or license amendment and the licensee uses the material in accordance with the regulations and specific conditions the agency considers necessary for the medical use of the material.

(r) Amendment of licenses at request of licensee.

(1) Requests for amendment of a license or deletion of an authorized use site shall be filed in accordance with §289.252(aa) of this title.

(2) A licensee without broad-scope authorization shall apply for and shall receive a license amendment prior to the following:

(A) receiving or using radioactive material for a type of use that is authorized in accordance with under this section, but is not authorized on their current license issued in accordance with this section;

(B) permitting anyone to work as an authorized user, authorized nuclear pharmacist or authorized medical physicist under the license;

(C) changing RSOs, except as provided in subsection (g)(5) of this section;

(D) receiving radioactive material in excess of the amount or in a different form, or receiving a different radionuclide than is authorized on the license;

(E) adding or changing the areas in which radioactive material is used or stored and are identified in the application or on the license;

(F) changing the address(es) of use identified in the application or on the license; and

(G) changing operating, safety, and emergency procedures.

(3) A licensee with broad-scope authorization shall apply for and shall receive a license amendment prior to taking actions specified in paragraph (2)(A), (C), (D), (F) and (G) of this subsection.

(s) Supervision. A licensee may permit the receipt, possession, use, or transfer of radioactive material by an individual under the supervision of an authorized user, unless prohibited by license condition.

(1) A licensee who permits the receipt, possession, use, or transfer of radioactive material by an individual under the supervision of an authorized user shall do the following:

(A) instruct the supervised individual in the licensee's written operating, safety, and emergency procedures, written directive procedures, requirements of this chapter, and license conditions with respect to the use of radioactive material; and

(B) require the supervised individual to follow the instructions of the supervising authorized user for medical uses of radioactive material, written operating, safety, and emergency procedures established by the licensee, written directive procedures, requirements of this chapter, and license conditions with respect to the medical use of radioactive material.

(2) A licensee who permits the preparation of radioactive material for medical use by an individual under the supervision of an authorized nuclear pharmacist or authorized user, shall do the following:

(A) instruct the supervised individual in the preparation of radioactive material for medical use, as appropriate to that individual's involvement with radioactive material; and

(B) require the supervised individual to follow the instructions of the supervising authorized user or authorized nuclear pharmacist regarding the preparation of radioactive material for medical use, the written operating, safety, and emergency procedures established by the licensee, the requirements of this chapter, and license conditions.

(3) A licensee who permits supervised activities in accordance with paragraphs (1) and (2) of this subsection is responsible for the acts and omissions of the supervised individual.

(4) Only an authorized user may authorize the medical use of radioactive material.

(t) Written directives.

(1) A written directive shall be dated and signed by an authorized user prior to any administration of sodium iodide I-131 greater than 30 microcuries (μCi) (1.11 megabequerels (MBq)), administration of any therapeutic dosage of unsealed radioactive material, or administration of any therapeutic dose of radiation from radioactive material.

(A) A written revision to an existing written directive may be made provided that the revision is dated and signed by an authorized user prior to the administration of the dosage of unsealed radioactive material, the brachytherapy dose, the gamma stereotactic radiosurgery dose, the teletherapy dose, or the next fractional dose.

(B) If, because of the emergent nature of the patient's condition, a delay in order to provide a written directive or to revise a written directive would jeopardize the patient's health, an oral directive or an oral revision to an existing written directive is acceptable. The information contained in the oral directive or oral revision shall be documented in writing as soon as possible in the patient's record. A written directive or revised written directive shall be prepared and signed by the authorized user within 48 hours of the oral directive or oral revision.

(2) The written directive shall contain the patient or human research subject's name and the following information for each application.

(A) For any administration of quantities greater than 30 μCi (1.11 MBq) of sodium iodide I-131, the dosage.

(B) For an administration of a therapeutic dosage of a radiopharmaceutical other than sodium iodide I-131:

(i) the radiopharmaceutical;

(ii) the dosage; and

(iii) route of administration.

(C) For gamma stereotactic radiosurgery:

(i) the total dose;

(ii) the treatment site; and

(iii) the values for the target coordinate settings per treatment for each anatomically distinct treatment site.

(D) For teletherapy:

(i) the total dose;

(ii) dose per fraction;

(iii) number of fractions; and

(iv) treatment site.

(E) For high-dose rate remote afterloading brachytherapy:

(i) the radionuclide;

(ii) treatment site;

(iii) dose per fraction;

(iv) number of fractions; and

(v) total dose.

(F) For all other brachytherapy, including low, medium, and pulsed rate afterloaders:

(i) prior to implantation:

(I) treatment site;

(II) the radionuclide; and

(III) dose;

(ii) after implantation but prior to completion of the procedure:

(I) the radionuclide;

(II) treatment site;

(III) number of sealed sources;

(IV) total sealed source strength; and

(V) exposure time or, the total dose.

(3) The licensee shall retain the written directive in accordance with subsection (www) of this section for inspection by the agency.

(4) Procedures for administrations requiring a written directive.

(A) For any administration requiring a written directive, the licensee shall develop, implement, and maintain written procedures to ensure that:

(i) the patient's or human research subject's identity is verified before each administration; and

(ii) each administration is in accordance with the written directive.

(B) The procedures required by subparagraph (A) of this paragraph shall, at a minimum, address the following items that are applicable for the licensee's use of radioactive material:

(i) verifying the identity of the patient or human research subject;

(ii) verifying that the administration is in accordance with the treatment plan, if applicable, and the written directive;

(iii) checking both manual and computer-generated dose calculations; and

(iv) verifying that any computer-generated dose calculations are correctly transferred into the consoles of therapeutic medical units authorized by subsection (dd) of this section.

(C) A licensee shall maintain a copy of the procedures required by subparagraph (A) of this paragraph in accordance with subsection (www) of this section.

(u) Suppliers for sealed sources or devices for medical use. A licensee may only use the following for medical use:

(1) sealed sources or devices manufactured, labeled, packaged, and distributed in accordance with a license issued by the agency, NRC, an agreement state, or licensing state;

(2) sealed sources or devices non-commercially transferred from an NRC or agreement state medical use licensee; or

(3) teletherapy sources manufactured and distributed in accordance with a license issued by the agency, NRC, an agreement state, or licensing state.

(v) Possession, use, and calibration of dose calibrators to measure the activity of unsealed radioactive material.

(1) For direct measurements performed in accordance with subsection (x) of this section, the licensee shall possess and use instrumentation to measure the activity of unsealed radioactive material before it is administered to each patient or human research subject.

(2) The licensee shall calibrate the instrumentation specified in paragraph (1) of this subsection in accordance with nationally recognized standards or the manufacturer's instructions.

(3) The calibration required by paragraph (2) of this subsection shall include tests for constancy, accuracy, linearity, and geometry dependence, as appropriate to demonstrate proper operation of the instrument. The tests for constancy, accuracy, linearity, and geometry dependence shall be conducted at the following intervals:

(A) constancy at least once each day prior to assay of patient dosages;

(B) linearity at installation, repair, relocation, and at least quarterly thereafter;

(C) geometry dependence at installation; and

(D) accuracy at installation and at least annually thereafter.

(4) The licensee shall maintain a record of each instrument calibration in accordance with subsection (www) of this section. The record shall include the following:

(A) model and serial number of the instrument and calibration sources;

(B) date of the calibration;

(C) results of the calibration; and

(D) name of the individual who performed the calibration.

(w) Calibration of survey instruments. A licensee shall calibrate the survey instruments used to show compliance with this subsection and with §289.202 of this title before first use, annually, and following a repair that affects the calibration. A licensee shall:

(1) calibrate all scales with readings up to 10 millisieverts (mSv) (1000 millirem (mrem)) per hour with a radiation source;

(2) calibrate two separated readings on each scale or decade that will be used to show compliance;

(3) conspicuously note on the instrument the date of calibration;

(4) not use survey instruments if the difference between the indicated exposure rate and the calculated exposure rate is more than 20%; and

(5) maintain a record of each survey instrument calibration in accordance with subsection (www) of this section.

(x) Determination of dosages of radioactive material for medical use.

(1) Before medical use, the licensee shall perform the following:

(A) record the activity of each dosage; and

(B) determine the activity of each dosage using a dose calibrator, by direct measurement of radioactivity, or a decay correction, based on the activity or activity concentration determined by the following:

(i) a manufacturer or preparer licensed in accordance with §289.252(r) of this title, or under an equivalent NRC, agreement state, or licensing state license; or

(ii) an NRC or agreement state licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an Investigational New Drug (IND) protocol accepted by the U.S. Food and Drug Administration (FDA).

(2) For other than unit dosages, this determination shall be made by:

(A) direct measurement of radioactivity; or

(B) combination of direct measurement of radioactivity and mathematical calculations.

(3) Unless otherwise directed by the authorized user, a licensee shall not use a dosage if the dosage does not fall within the prescribed dosage range or if the dosage differs from the prescribed dosage by more than 20%.

(4) A licensee restricted to only unit doses prepared in accordance with §289.252(r) of this title need not comply with the requirements in paragraph (1)(B) of this subsection, unless the administration time of the unit dose deviates from the nuclear pharmacy's pre-calibrated time by 15 minutes or more.

(5) A licensee shall maintain a record of the dosage determination required by this subsection in accordance with subsection (www) of this section for inspection by the agency. The record shall contain the following:

(A) radionuclide, generic name, trade name, or abbreviation of the radiopharmaceutical;

(B) patient's or human research subject's name or identification number if one has been assigned;

(C) prescribed dosage;

(D) determined dosage or a notation that the total activity is less than 30 µCi (1.1 MBq);

(E) the date and time of the dosage determination; and

(F) the name of the individual who determined the dosage.

(y) Authorization for calibration and reference sources. Any licensee authorized by subsections (n), (o), (p) or (q) of this section for medical use of radioactive material may receive, possess, and use the following radioactive material for check, calibration, and reference use:

(1) sealed sources manufactured and distributed in accordance with a license issued by the agency, NRC, or another agreement state and that do not exceed 30 millicuries (mCi) (1.11 gigabecquerel (GBq)) each;

(2) sealed sources redistributed by a licensee authorized to redistribute the sealed sources manufactured and distributed in accordance with a license issued by the agency, NRC, or another agreement state and that do not exceed 30 mCi (1.11GBq) each, provided the redistributed sealed sources are in the original packaging and shielding and are accompanied by the manufacturer's approved instructions;

(3) any radioactive material with a half-life not longer than 120 days in individual amounts not to exceed 15 mCi (0.56 GBq);

(4) any radioactive material with a half-life longer than 120 days in individual amounts not to exceed the smaller of 200 µCi (7.4 MBq) or 1000 times the quantities in §289.202(qqq)(3) of this title; and

(5) technetium-99m in amounts as needed.

(z) Requirements for possession of sealed sources and brachytherapy sealed sources. A licensee in possession of any sealed source or brachytherapy source shall:

(1) follow the radiation safety and handling instructions supplied by the manufacturer and the leakage test requirements in accordance with §289.201(g) of this title and reporting requirements in §289.202(bbb) of this title; and

(2) conduct a physical inventory at intervals not to exceed six months to account for all sealed sources in its possession. Records of the inventory shall be made and maintained for inspection by the agency in accordance with subsection (www) of this section and shall include the following:

(A) model number of each source and serial number if one has been assigned;

(B) identity of each source and its nominal activity;

(C) location of each source;

(D) date of the inventory; and

(E) identification of the individual who performed the inventory.

(aa) Labeling of vials and syringes. Each syringe and vial that contains a radiopharmaceutical shall be labeled to identify the radioactive drug. Each syringe shield and vial shield shall also be labeled unless the label on the syringe or vial is visible when shielded.

(bb) Surveys for ambient radiation exposure rate.

(1) In addition to the requirements of §289.202(p) of this title and except as provided in paragraph (2) of this subsection, a licensee shall survey with a radiation detection survey instrument at the end of each day of use all areas where radioactive material requiring a written directive was prepared for use or administered.

(2) A licensee does not need to perform the surveys required by paragraph (1) of this subsection in an area(s) where patients or human research subjects are confined when they cannot be released in accordance with subsection (cc) of this section or an animal that is confined. Once the patient or human or animal research subject is released from confinement, the licensee shall survey with a radiation

survey instrument, the area in which the patient or human or animal research subject was confined.

(3) A record of each survey shall be retained in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the survey;

(B) results of the survey;

(C) manufacturer's name, model, and serial number of the instrument used to make the survey; and

(D) name of the individual who performed the survey.

(cc) Release of individuals containing radioactive drugs or implants containing radioactive material.

(1) The licensee may authorize the release from its control any individual who has been administered radioactive drugs or implants containing radioactive material if the total effective dose equivalent (TEDE) to any other individual from exposure to the released individual is not likely to exceed 0.5 rem (5 mSv). Patients treated with temporary eye plaques may be released from the hospital provided that the procedures ensure that the exposure rate from the patient is less than 5 mr per hour at a distance of 1 meter from the eye plaque location.

(2) The licensee shall provide the released individual, or the individual's parent or guardian, with written instructions on actions recommended to maintain doses to other individuals ALARA if the TEDE to any other individual is likely to exceed 0.1 rem (1 mSv). If the TEDE to a nursing infant or child could exceed 0.1 rem (1 mSv), assuming there was no interruption of breast-feeding, the instructions shall also include the following:

(A) guidance on the interruption or discontinuation of breast-feeding; and

(B) information on the potential consequences, if any, of failure to follow the guidance.

(3) The licensee shall maintain for inspection by the agency, a record in accordance with subsection (www) of this section of each patient released in accordance with paragraph (1) of this subsection. The record shall include the following:

(A) the basis for authorizing the release of an individual; and

(B) the instructions provided to a breast-feeding woman. if the radiation dose to the infant or child from continued breast-feeding could result in a TEDE exceeding 0.5 rem (5 mSv).

(dd) Mobile nuclear medicine service. A license for a mobile nuclear medicine service for medical or veterinary use of radioactive material will be issued if the agency approves the documentation submitted by the applicant in accordance with the requirements of subsections (f) and (n) of this section. The clients of the mobile nuclear medicine service shall be licensed if the client receives or possesses radioactive material to be used by the mobile nuclear medicine service.

(1) A licensee providing mobile nuclear medicine service shall:

(A) obtain a letter signed by the management of each client for which services are rendered that permits the use of radioactive material at the client's address and clearly delineates the authority and responsibility of the licensee and the client;

(B) check instruments used to measure the activity of unsealed radioactive material for proper function before medical or veterinary use at each client's address or on each day of use, whichever is more frequent. At a minimum, the check for proper function required by this subparagraph shall include a constancy check;

(C) have at least one fixed facility where records may be maintained and radioactive material may be delivered by manufacturers or distributors each day prior to the mobile nuclear medicine licensee dispatching its vans to client sites;

(D) agree to have an authorized physician user directly supervise each technologist at a reasonable frequency;

(E) check survey instruments for proper operation with a dedicated check source before use at each client's address; and

(F) before leaving a client's address, survey all areas of use to ensure compliance with the requirements of §289.202 of this title.

(2) A mobile nuclear medicine service shall not have radioactive material delivered from the manufacturer or the distributor to the client unless the client has a license allowing possession of the radioactive material. Radioactive material delivered to the client shall be received and handled in conformance with the client's license.

(3) A licensee providing mobile nuclear medicine services shall maintain records, for inspection by the agency, in accordance with subsection (www) of this section including the letter required in paragraph (1)(A) of this subsection and the record of each survey required in paragraph (1)(F) of this subsection.

(ee) Decay-in-storage.

(1) The licensee may hold radioactive material with a physical half-life of less than 65 days for decay-in-storage and dispose of it without regard to its radioactivity if the licensee does the following:

(A) monitors radioactive material at the surface before disposal and determines that its radioactivity cannot be distinguished from the background radiation level with an appropriate radiation detection survey meter set on its most sensitive scale and with no interposed shielding; and

(B) removes or obliterates all radiation labels, except for radiation labels on materials that are within containers and that will be handled as biomedical waste after it has been released from the licensee.

(2) The licensee shall retain a record of each disposal as required by paragraph (1) of this subsection in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the disposal;

(B) manufacturer's name, model number and serial number of the survey instrument used;

(C) background radiation level;

(D) radiation level measured at the surface of each waste container; and

(E) name of the individual who performed the survey.

(ff) Use of unsealed radioactive material for uptake, dilution, and excretion studies that do not require a written directive. Except for quantities that require a written directive in accordance with subsection (t) of this section, a licensee may use any unsealed radioactive material prepared for medical or veterinary use for uptake, dilution, or excretion studies that meets the following:

(1) is obtained from a manufacturer or preparer licensed in accordance with §289.252 of this title or equivalent NRC, agreement state, or licensing state requirements; or

(2) is prepared by one of the following:

(A) an authorized nuclear pharmacist;

(B) a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) and (jj)(3)(B)(vii) of this section, or prior to the effective date of this rule, meets the requirements of subsection (l)(2) of this section for imaging and localization studies and unsealed radioactive material requiring a written directive;

(C) an individual under the supervision, as specified in subsection (s) of this section, of an authorized nuclear pharmacist or an authorized user in subparagraphs (A) and (B) of this paragraph; or

(3) is obtained from and prepared by an NRC, agreement state, or licensing state licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an IND protocol accepted by the FDA; or

(4) is prepared by the licensee for use in research in accordance with a Radioactive Drug Research Committee-approved application or an IND protocol accepted by the FDA.

(gg) Training for uptake, dilution, and excretion studies. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (ff) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements in paragraph (4) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation). To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) complete 60 hours of training and experience in basic radionuclide handling techniques and radiation safety applicable to the medical use of unsealed radioactive material for uptake, dilution, and excretion studies that includes the topics listed in paragraph (3) of this subsection; and

(B) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, and quality control; or

(2) is an authorized user in accordance with subsections (jj) or (nn) of this section; or

(3) has completed 60 hours of training and experience, including a minimum of eight hours of classroom and laboratory training, in basic radionuclide handling techniques applicable to the medical use of unsealed radioactive material for uptake, dilution, and excretion studies. The training and experience shall include the following.

(A) Classroom and laboratory training in the following areas:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity;

(iv) chemistry of radioactive material for medical use; and

(v) radiation biology.

(B) Work experience, under the supervision of an authorized user who meets the requirements of this subsection, subsections (jj), or (nn) of this section involving the following:

(i) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(ii) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(iii) calculating, measuring, and safely preparing patient or human research subject dosages;

(iv) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(v) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(vi) administering dosages of radioactive drugs to patients or human research subjects; and

(4) has obtained written attestation, signed by a preceptor authorized user who meets the requirements of this subsection, subsections (jj), or (nn) of this section that the individual has satisfactorily completed the requirements of paragraph (1)(A) or (3) of this subsection and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized in accordance with subsection (ff) of this section.

(hh) Use of unsealed radioactive material for imaging and localization studies that do not require a written directive. Except for quantities that require a written directive in accordance with subsection (t) of this section, a licensee may use any unsealed radioactive material prepared for medical or veterinary use for imaging and localization studies that meets the following:

(1) is obtained from a manufacturer or preparer licensed in accordance with §289.252 of this title or equivalent NRC, agreement state, or licensing state requirements; or

(2) is prepared by one of the following:

(A) an authorized nuclear pharmacist; or

(B) a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) and (jj)(3)(vii) of this section, or prior to the effective date of this rule, meets the requirements of subsection (l)(2) of this section for imaging and localization studies not requiring a written directive; or

(C) an individual under the supervision, as specified in subsection (s) of this section, of an authorized nuclear pharmacist or an authorized user in subparagraphs (A) and (B) of this paragraph; or

(D) is obtained from and prepared by an NRC, agreement state, or licensing state licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an IND protocol accepted by the FDA; or

(E) is prepared by the licensee for use in research in accordance with a Radioactive Drug Research Committee-approved application or an IND protocol accepted by the FDA.

(3) Any licensee who processes and prepares radiopharmaceuticals for human use shall do so according to instructions that are furnished by the manufacturer on the label attached to or in the FDA-accepted instructions in the leaflet or brochure that accompanies the generator or reagent kit or the rules of the practice of pharmacy, as promulgated by the Texas State Board of Pharmacy.

(ii) Permissible molybdenum-99 concentration.

(1) The licensee may not administer to humans a radiopharmaceutical containing more than 0.15 μCi of molybdenum-99 per millicurie of technetium-99m (0.15 kilobecquerel of molybdenum-99 per megabecquerel of technetium-99m).

(2) The licensee who uses molybdenum-99/technetium-99m generators for preparing a technetium-99m radiopharmaceutical shall measure the molybdenum-99 concentration of the first eluate after receipt of a generator to demonstrate compliance with paragraph (1) of this subsection.

(3) If the licensee is required to measure the molybdenum-99 concentration, the licensee shall retain a record of each measurement in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following for each measured elution of technetium-99m:

(A) ratio of the measures expressed as microcuries of molybdenum-99 per millicurie of technetium-99m (kilobecquerel of molybdenum-99 per megabecquerel of technetium-99m);

(B) time and date of the measurement; and

(C) name of the individual who made the measurement.

(jj) Training for imaging and localization studies.

(1) Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (hh) of this section to be a physician who:

(A) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements of subparagraph (D) of this paragraph. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation). To have its certification recognized, a specialty board shall require all candidates for certification to:

(i) complete 700 hours of training and experience in basic radionuclide handling techniques and radiation safety applicable to the medical use of unsealed radioactive material for imaging and localization studies that includes the topics listed in subparagraph (C) of this paragraph; and

(ii) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, and quality control; or

(B) is an authorized user in accordance with subsection (nn) of this section; and meets the requirements of subparagraph (C)(ii)(VII) of this paragraph; or

(C) has completed 700 hours of training and experience, including a minimum of 80 hours of classroom and laboratory training, in basic radionuclide handling techniques applicable to the medical use of unsealed radioactive material for imaging and localization studies. The training and experience shall include the following.

(i) Classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology.

(ii) Work experience under the supervision of an authorized user who meets the requirements in this subsection, or subclause (VII) of this clause, and subsection (nn) of this section, involving the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(III) calculating, measuring, and safely preparing patient or human research subject dosages;

(IV) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(V) using procedures to contain spilled radioactive material safely and using proper decontamination procedures;

(VI) administering dosages of radioactive drugs to patients or human research subjects; and

(VII) eluting generator systems appropriate for preparation of radioactive drugs for imaging and localization studies, measuring and testing the eluate for radionuclide purity, and processing the eluate with reagent kits to prepare labeled radioactive drugs; and

(D) has obtained written attestation, signed by a preceptor authorized user who meets the requirements of this subsection or subparagraph (C)(ii)(VII) of this paragraph and subsection (nn) of this section that the individual has satisfactorily completed the requirements of subparagraph (A)(i) or (C) of this paragraph and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized in accordance with subsections (ff) and (hh) of this section.

(2) In addition to the training and experience requirements of paragraph (1) of this subsection, for the use of positron emission tomography (PET) radionuclides, the licensee shall require that the authorized user has:

(A) completed 24 hours of work experience specific to the use of PET radionuclides consistent with paragraph (1)(C)(ii)(I) - (VI) of this subsection; and

(B) a written attestation statement specific to the use of PET radionuclides for diagnostic imaging.

(kk) Use of unsealed radioactive material that requires a written directive. A licensee may use any unsealed radioactive material prepared for medical use that requires a written directive in accordance with subsection (t) of this section that meets the following:

(1) is obtained from a manufacturer or preparer licensed in accordance with §289.252 of this title or equivalent NRC, agreement state, or licensing state requirements;

(2) is prepared by one of the following:

(A) an authorized nuclear pharmacist;

(B) a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) of this section; or

(C) an individual under the supervision, as specified in subsection (s) of this section, of an authorized nuclear pharmacist or an authorized user in subparagraphs (A) and (B) of this paragraph;

(3) is obtained from and prepared by an NRC, agreement state, or licensing state licensee for use in research in accordance with an IND protocol accepted by the FDA; or

(4) is prepared by the licensee for use in research in accordance with an IND protocol accepted by the FDA.

(ll) Safety instruction to personnel.

(1) The licensee shall provide radiation safety instruction, initially and at least annually, to personnel caring for patients or human or animal research subjects who cannot be released in accordance with subsection (cc) of this section. The instruction shall be appropriate to the personnel's assigned duties and include the following:

(A) patient or human or animal research subject control; and

(B) visitor control to include the following:

(i) routine visitation to hospitalized individuals or animals in accordance with §289.202(n) of this title;

(ii) contamination control;

(iii) waste control; and

(iv) notification of the RSO, or his or her designee, and an authorized user if the patient or the human or animal research subject has a medical emergency or dies.

(2) The licensee shall maintain a record for inspection by the agency, in accordance with subsection (www) of this section, of individuals receiving instruction. The record shall include the following:

(A) list of the topics covered;

(B) date of the instruction or training;

(C) name(s) of the attendee(s); and

(D) name(s) of the individual(s) who provided the instruction.

(mm) Safety precautions. For each human patient or human research subject who cannot be released in accordance with subsection (cc) of this section, the licensee shall do the following:

(1) provide a private room with a private sanitary facility; or

(2) provide a room with a private sanitary facility with another individual who also has received therapy with an unsealed radioactive material and who also cannot be released in accordance with subsection (cc) of this section;

(3) post the patient's or the research subject's room with a "Radioactive Materials" sign and note on the door and in the patient's or research subject's chart where and how long visitors may stay in the patient's or the research subject's room; and

(4) either monitor material and items removed from the patient's or the research subject's room to determine that their radioactivity cannot be distinguished from the natural background radiation level with a radiation detection survey instrument set on its most sensitive scale and with no interposed shielding, or handle such material and items as radioactive waste; and

(5) notify the RSO, or his or her designee, and the authorized user immediately if the patient or research subject has a medical emergency or dies.

(nn) Training for use of unsealed radioactive material that requires a written directive. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (kk) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC, an agreement state, or licensing state and who meets the requirements in paragraph (2)(B)(vi) and (C) this subsection. (Specialty boards whose certification processes have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's webpage, www.dshs.state.tx.us/radiation). To be recognized, a specialty board shall require all candidates for certification to:

(A) successfully complete residency training in a radiation therapy or nuclear medicine training program or a program in a related medical specialty. These residency training programs shall include 700 hours of training and experience as described in paragraph (2)(A) - (B)(v) of this subsection. Eligible training programs shall be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Post-Graduate Training of the American Osteopathic Association; and

(B) pass an examination, administered by diplomates of the specialty board, which tests knowledge and competence in radiation safety, radionuclide handling, quality assurance, and clinical use of unsealed radioactive material for which a written directive is required; or

(2) has completed 700 hours of training and experience, including a minimum of 200 hours of classroom and laboratory training, in basic radionuclide handling techniques applicable to the medical use of unsealed radioactive material requiring a written directive. The training and experience shall include the following.

(A) Classroom and laboratory training in the following areas:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity;

(iv) chemistry of radioactive material for medical use; and

(v) radiation biology.

(B) Work experience, under the supervision of an authorized user who meets the requirements of this subsection. A supervising authorized user, who meets the requirements of this paragraph shall also have experience in administering dosages in the same dosage category or categories (for example, in accordance with clause (vi) of this subparagraph) as the individual requesting authorized user status. The work experience shall involve the following:

(i) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(ii) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(iii) calculating, measuring, and safely preparing patient or human research subject dosages;

(iv) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(v) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(vi) administering dosages of radioactive drugs to patients or human research subjects involving a minimum of three cases in each of the following categories for which the individual is requesting authorized user status:

(I) oral administration of less than or equal to 33 mCi (1.22 GBq) of sodium iodide I-131, for which a written directive is required;

(II) oral administration of greater than 33 mCi (1.22 GBq) of sodium iodide I-131 (experience with at least three cases in this subclause also satisfies the requirement of subclause (I) of this clause);

(III) parenteral administration of any beta emitter or a photon-emitting radionuclide with a photon energy less than 150 kiloelecton volts (keV) for which a written directive is required; and/or

(IV) parenteral administration of any other radionuclide for which a written directive is required; and

(C) written attestation that the individual has satisfactorily completed the requirements of paragraphs (1)(A) and (2)(B)(vi) or (2) of this subsection, and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized in accordance with subsection (kk) of this section. The written attestation shall be signed by a preceptor authorized user who meets the requirements of this subsection. The preceptor authorized user who meets the requirements in paragraph (2) of this subsection shall have experience in administering dosages in the same dosage category or categories (for example, in accordance with paragraph (2)(B)(vi) of this subsection) as the individual requesting authorized user status.

(oo) Training for the oral administration of sodium iodide I-131 requiring a written directive in quantities less than or equal to 33 mCi (1.22 GBq). Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the oral administration of sodium iodide I-131 requiring a written directive in quantities less than or equal to 33 mCi (1.22 GBq) to be a physician who:

(1) is certified by a medical specialty board whose certification process includes all of the requirements of paragraphs (3) and (4) of this subsection and whose certification has been recognized by the agency, the NRC, an agreement state, or licensing state. (The names of board certifications which have been recognized by the agency, the NRC, agreement state or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation); or

(2) is an authorized user in accordance with subsection (nn) of this section for uses listed in subsection (nn)(2)(B)(vi)(I) or (II) of this section, or subsection (pp) of this section; or

(3) has successfully completed 80 hours of classroom and laboratory training and work experience applicable to the medical use of sodium iodide I-131 for procedures requiring a written directive. The training and experience shall include the following.

(A) Classroom and laboratory training shall include the following:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity;

(iv) chemistry of radioactive material for medical use; and

(v) radiation biology.

(B) Work experience, under the supervision of an authorized user who meets the requirements of this subsection, subsection (nn) or subsection (pp) of this section. A supervising authorized user who meets the requirements in subsection (nn)(2) of this section, shall also have experience in administering dosages as specified in subsection (nn)(2)(B)(vi)(I) or (II) of this section. The work experience shall involve the following:

(i) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(ii) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(iii) calculating, measuring, and safely preparing patient or human research subject dosages;

(iv) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(v) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(vi) administering dosages of radioactive drugs to patients or human research subjects that includes at least three cases involving the oral administration of less than or equal to 33mCi (1.22 GBq) of sodium iodide I-131; and

(4) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraph (3) of this section, and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized in accordance with subsection (kk) of this section. The written attestation shall be signed by a preceptor authorized user who meets the requirements of this subsection, subsection (nn) or subsection (pp) of this section. A preceptor authorized user, who meets the requirements in subsection (nn)(2) of this section shall also have experience in administering dosages as specified in subsection (nn)(2)(B)(vi)(I) or (II) of this section.

(pp) Training for the oral administration of sodium iodide I-131 requiring a written directive in quantities greater than 33 mCi (1.22 GBq). Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the oral administration of sodium iodide I-131 requiring a written directive in quantities greater than 33 mCi (1.22 GBq) to be a physician who:

(1) is certified by a medical specialty board whose certification process includes all of the requirements in paragraph (3) of this subsection and whose certification has been recognized by the agency, the NRC, an agreement state, or licensing state and who meets the requirements of paragraph (4) of this subsection. (The names of board certifications which have been recognized by the agency, the NRC, agreement state or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation);

(2) is an authorized user in accordance with subsection (nn) of this section for uses listed in subsection (nn)(2)(B)(vi)(II) of this section; or

(3) has training and experience including, successful completion of 80 hours of classroom and laboratory training applicable to the medical use of sodium iodide I-131 for procedures requiring a written directive. The training and experience shall include the following.

(A) Classroom and laboratory training shall include the following:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity;

(iv) chemistry of radioactive material for medical use;

(v) radiation biology.

(B) Work experience, under the supervision of an authorized user who meets the requirements of subsections (nn) or (pp) of this section. A supervising authorized user who meets the requirements of subsection (nn)(2) of this section, shall also have experience in administering dosages as specified in subsection (nn)(2)(B)(vi)(II) of this section. The work experience shall involve the following:

(i) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(ii) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(iii) calculating, measuring, and safely preparing patient or human research subject dosages;

(iv) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(v) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(vi) administering dosages of radioactive drugs to patients or human research subjects that includes at least three cases involving the oral administration of greater than 33mCi (1.22 GBq) of sodium iodide I-131; and

(4) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraph (3) of this subsection, and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized in accordance with subsection (kk) of this section. The written attestation shall be signed by a preceptor authorized user who meets the requirements in this subsection or subsection (nn) of this section. The preceptor authorized user, who meets the requirements in subsection (nn)(2) of this section, shall also have experience in administering dosages as specified in subsection (nn)(2)(B)(vi)(II) of this section.

(qq) Training for the parenteral administration of unsealed radioactive material requiring a written directive. Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the parenteral administration requiring a written directive to be a physician who:

(1) is an authorized user in accordance with subsection (nn) of this section for uses listed in subsection (nn)(2)(B)(vi)(III) or (IV) of this section; or

(2) is an authorized user under subsections (zz) or (ttt) of this section and who meets the requirements of paragraph (4) of this subsection; or

(3) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC, an agreement state, or licensing state in accordance with subsections (zz) or (ttt) of this section, and who meets the requirements of paragraph (4) of this subsection. (The names of board certifications which have been recognized by the agency, the NRC, agreement state or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation); and

(4) has successfully completed training and experience including 80 hours of classroom and laboratory training applicable to parenteral administrations requiring a written directive, of any beta emitting radionuclide or any photon-emitting radionuclide with a photon energy less than 150 keV, and/or parenteral administration of any other radionuclide for which a written directive is required. The training and experience shall include the following.

(A) Classroom and laboratory training shall include the following:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity;

(iv) chemistry of radioactive material for medical use; and

(v) radiation biology.

(B) Work experience, under the supervision of an authorized user who meets the requirements of this subsection or subsection (nn) of this section in the parenteral administration, for which a written directive is required, of any beta emitter or any photon-emitting radionuclide with a photon energy less than 150 keV, and/or parenteral administration of any other radionuclide for which a written directive is required. A supervising authorized user who meets the requirements of subsection (nn) of this section, shall have experience in administering dosages as specified in subsection (nn)(2)(B)(vi)(III) and/or (IV) of this section. The work experience shall involve the following:

(i) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(ii) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(iii) calculating, measuring, and safely preparing patient or human research subject dosages;

(iv) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(v) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(vi) administering dosages to patients or human research subjects that include at least three cases involving the parenteral administration, for which a written directive is required, of any beta emitter or any photon-emitting radionuclide with a photon energy less than 150 keV and/or at least three cases involving the parenteral administration of any other radionuclide, for which a written directive is required; and

(5) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraphs (2) or (3) of this subsection, and has achieved a level of competency sufficient to function independently as an authorized user for the parenteral administration of unsealed radioactive materials requiring a written directive. The written attestation shall be signed by a preceptor authorized user who meets the requirements of this subsection or subsection (nn) of this section. A preceptor authorized user, who meets the requirements of subsection (nn) of this section shall have experience in administer-

ing dosages as specified in subsection (nn)(2)(B)(vi)(III) and/or (IV) of this section.

(rr) Use of sealed sources for manual brachytherapy. The licensee shall use only brachytherapy sealed sources for therapeutic medical uses as follows:

(1) as approved in the Sealed Source and Device Registry; or

(2) in research in accordance with an active Investigational Device Exemption application accepted by the FDA and as approved by the agency.

(ss) Surveys after sealed source implants and removal.

(1) Immediately after implanting sealed sources in a patient or a human or animal research subject, the licensee shall perform a survey to locate and account for all sealed sources that have not been implanted.

(2) Immediately after removing the last temporary implant sealed source from a patient or a human or animal research subject, the licensee shall perform a survey of the patient or the human or animal research subject with a radiation detection survey instrument to confirm that all sealed sources have been removed.

(3) A record of each survey shall be retained, for inspection by the agency, in accordance with subsection (www) of this section. The record shall include the following:

(A) date of the survey;

(B) results of the survey;

(C) manufacturer's name and model and serial number of the instrument used to make the survey; and

(D) name of the individual who performed the survey.

(tt) Brachytherapy sealed sources accountability.

(1) The licensee shall maintain accountability at all times for all brachytherapy sealed sources in storage or use.

(2) Promptly after removing sealed sources from a patient or a human or animal research subject, the licensee shall return brachytherapy sealed sources to a secure storage area.

(3) The licensee shall maintain a record of the brachytherapy sealed source accountability in accordance with subsection (www) of this section for inspection by the agency.

(A) When removing temporary implants from storage, the licensee shall record the number and activity of sources, time and date the sources were removed, the name of the individual who removed the sources, and the location of use. When temporary implants are returned to storage, record the number and activity of sources, the time and date, and the name of the individual who returned them.

(B) When removing permanent implants from storage, the licensee shall record the number and activity of sources, date, the name of the individual who removed the sources, and the number and activity of sources permanently implanted in the patient or human research subject. Record the number and activity of sources not implanted and returned to storage, the date, and the name of the individual who returned them to storage.

(uu) Safety instruction to personnel. The licensee shall provide radiation safety instruction, initially and at least annually, to personnel caring for patients or human or animal research subjects who are receiving brachytherapy and who cannot be released in accordance with subsection (cc) of this section or animals that are confined.

(1) The instruction shall be appropriate to the personnel's assigned duties and include the following:

(A) size and appearance of brachytherapy sources;

(B) safe handling and shielding instructions;

(C) patient or human research subject control;

(D) visitor control to include visitation to hospitalized individuals in accordance with §289.202(n) of this title; and

(E) notification of the RSO, or his or her designee, and an authorized user if the patient or the human or animal research subject has a medical emergency or dies.

(2) A licensee shall maintain a record, for inspection by the agency, in accordance with subsection (www) of this section, of individuals receiving instruction. The record shall include the following:

(A) list of the topics covered;

(B) date of the instruction or training;

(C) name(s) of the attendee(s); and

(D) name(s) of the individual(s) who provided the instruction.

(vv) Safety precautions for the use of brachytherapy.

(1) For each patient or human research subject who is receiving brachytherapy and cannot be released in accordance with subsection (cc) of this section the licensee shall:

(A) provide a private room with a private sanitary facility;

(B) post the patient's or the research subject's room with a "Radioactive Materials" sign and note on the door or in the patient's or research subject's chart where and how long visitors may stay in the patient's or the research subject's room; and

(C) have available near each treatment room applicable emergency response equipment to respond to a sealed source that is inadvertently dislodged from the patient or inadvertently lodged within the patient following removal of the sealed source applicators.

(2) The RSO, or his or her designee, and the authorized user shall be notified if the patient or research subject has a medical emergency and, immediately, if the patient dies.

(ww) Calibration measurements of brachytherapy sealed sources.

(1) Prior to the first medical use of a brachytherapy sealed source on or after October 1, 2000, the licensee shall do the following:

(A) determine the sealed source output or activity using a dosimetry system that meets the requirements of subsection (iii)(1) of this section;

(B) determine sealed source positioning accuracy within applicators; and

(C) use published protocols accepted by nationally recognized bodies to meet the requirements of subparagraphs (A) and (B) of this paragraph.

(2) Instead of the licensee making its own measurements as required in paragraph (1) of this subsection, the licensee may use measurements provided by the source manufacturer or by a calibration laboratory accredited by the American Association of Physicists in Medicine that are made in accordance with paragraph (1) of this subsection.

(3) The licensee shall mathematically correct the outputs or activities determined in paragraph (1) of this subsection for physical decay at intervals consistent with 1.0% physical decay.

(4) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the calibration;

(B) manufacturer's name and model and serial number for the sealed source and instruments used to calibrate the sealed source;

(C) sealed source output or activity;

(D) sealed source positioning accuracy within applicators; and

(E) name of the individual, the source manufacturer, or the calibration laboratory that performed the calibration.

(xx) Decay of strontium-90 sources for ophthalmic treatments.

(1) Only an authorized medical physicist shall calculate the activity of each strontium-90 source that is used to determine the treatment times for ophthalmic treatments. The decay shall be based on the activity determined in accordance with subsection (ww) of this section.

(2) A licensee shall maintain a record of the strontium-90 source in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date and initial activity of the source as determined in subsection (ww) of this section; and

(B) for each decay calculation, the date and the source activity as determined in subsection (ww) of this section.

(yy) Therapy-related computer systems. The licensee shall perform acceptance testing on the treatment planning system in accordance with published protocols accepted by nationally recognized bodies. At a minimum, the acceptance testing shall include, as applicable, verification of the following:

(1) the sealed source-specific input parameters required by the dose calculation algorithm;

(2) the accuracy of dose, dwell time, and treatment time calculations at representative points;

(3) the accuracy of isodose plots and graphic displays; and

(4) the accuracy of the software used to determine radioactive sealed source positions from radiographic images.

(zz) Training for use of manual brachytherapy sealed sources. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of a manual brachytherapy source for the uses authorized in subsection (rr) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements of paragraph (2)(D) of this section. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation). To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) successfully complete a minimum of three years of residency training in a radiation oncology program approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Post-Graduate Training of the American Osteopathic Association; and

(B) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, treatment planning, quality assurance, and clinical use of manual brachytherapy; or

(2) has completed a structured educational program in basic radionuclide handling techniques applicable to the use of manual brachytherapy sources including the following:

(A) 200 hours of classroom and laboratory training in the following areas:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity; and

(iv) radiation biology.

(B) 500 hours of work experience, under the supervision of an authorized user who meets the requirements of this subsection at a medical institution, involving the following:

(i) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(ii) checking survey meters for proper operation;

(iii) preparing, implanting, and removing brachytherapy sources;

(iv) maintaining running inventories of material on hand;

(v) using administrative controls to prevent a medical event involving the use of radioactive material; and

(vi) using emergency procedures to control radioactive material; and

(C) has completed three years of supervised clinical experience in radiation oncology, under an authorized user who meets the requirements of this subsection as part of a formal training program approved by the Residency Review Committee for Radiation Oncology of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Postdoctoral Training of the American Osteopathic Association. This experience may be obtained concurrently with the supervised work experience required by subparagraph (B) of this paragraph; and

(D) has obtained written attestation, signed by a preceptor authorized user who meets the requirements of this subsection that the individual has satisfactorily completed the requirements of paragraph (1)(A) of this subsection or subparagraphs (A) - (C) of this paragraph and has achieved a level of competency sufficient to function independently as an authorized user of manual brachytherapy for the medical uses authorized in accordance with subsection (rr) of this section.

(aaa) Training for ophthalmic use of strontium-90. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of strontium-90 for ophthalmic radiotherapy to be a physician who:

(1) is an authorized user under subsection (zz) of this section; or

(2) has completed 24 hours of classroom and laboratory training applicable to the medical use of strontium-90 for ophthalmic radiotherapy. The training shall include the following.

(A) Classroom training shall include the following:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity; and

(iv) radiation biology.

(B) Supervised clinical training in ophthalmic radiotherapy under the supervision of an authorized user at a medical institution, clinic, or private practice that includes the use of strontium-90 for the ophthalmic treatment of five individuals. This supervised clinical training shall involve:

(i) examination of each individual to be treated;

(ii) calculation of the dose to be administered;

(iii) administration of the dose; and

(iv) follow-up and review of each individual's case history; and

(C) has obtained written attestation, signed by a preceptor authorized user who meets the requirements of this subsection or subsection (zz) of this section that the individual has satisfactorily completed the requirements of paragraphs (1) and (2) of this subsection and has achieved a level of competency sufficient to function independently as an authorized user of strontium-90 for ophthalmic use.

(bbb) Use of sealed sources for diagnosis. The licensee shall use only sealed sources for diagnostic medical uses as approved in the Sealed Source and Device Registry.

(ccc) Training for use of sealed sources for diagnosis. Except as provided in subsection (l) of this section, the licensee shall require the authorized user of a diagnostic sealed source for use in a device authorized in accordance with subsection (bbb) of this section to be a physician, dentist, or podiatrist who:

(1) is certified by a specialty board whose certification process includes the requirements of paragraphs (2) and (3) of this subsection and whose certification has been recognized by the agency, the NRC, an agreement state, or licensing state. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation); or

(2) has completed eight hours of classroom and laboratory training in basic radioisotope handling techniques specifically applicable to the use of the device. The training shall include:

(A) radiation physics and instrumentation;

(B) radiation protection;

(C) mathematics pertaining to the use and measurement of radioactivity; and

(D) radiation biology; and

(3) has completed training in the use of the device for the uses requested.

(ddd) Use of a sealed source in a remote afterloader unit, teletherapy unit, or gamma stereotactic radiosurgery unit. The licensee shall use sealed sources in photon-emitting remote afterloader units, teletherapy units, or gamma stereotactic units for therapeutic medical uses as follows:

(1) as approved in the Sealed Source and Device Registry; or

(2) in research in accordance with an active Investigational Device Exemption (IDE) application accepted by the FDA provided the requirements of subsection (u) of this section are met.

(eee) Surveys of patients and human research subjects treated with a remote afterloader unit.

(1) Before releasing a patient or a human research subject from licensee control, the licensee shall perform a survey of the patient or the human research subject and the remote afterloader unit with a portable radiation detection survey instrument to confirm that the sealed source(s) has been removed from the patient or human research subject and returned to the safe shielded position.

(2) The licensee shall maintain a record of the surveys in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the survey;

(B) results of the survey;

(C) manufacturer's name, model, and serial number of the survey instrument used; and

(D) name of the individual who made the survey.

(fff) Installation, maintenance, adjustment, and repair.

(1) Only a person specifically licensed by the agency, the NRC, an agreement state, or licensing state shall install, maintain, adjust, or repair a remote afterloader unit, teletherapy unit, or gamma stereotactic radiosurgery unit that involves work on the sealed source(s) shielding, the sealed source(s) driving unit, or other electronic or mechanical component that could expose the sealed source(s), reduce the shielding around the sealed source(s), or compromise the radiation safety of the unit or the sealed source(s).

(2) Except for low dose-rate remote afterloader units, only a person specifically licensed by the agency, the NRC, an agreement state, or licensing state shall install, replace, relocate, or remove a sealed source or sealed source contained in other remote afterloader units, teletherapy units, or gamma stereotactic units.

(3) For a low dose-rate remote afterloader unit, only a person specifically licensed by the agency, the NRC, an agreement state, a licensing state, or an authorized medical physicist shall install, replace, relocate, or remove a sealed source(s) contained in the unit.

(4) The licensee shall maintain a record of the installation, maintenance, adjustment and repair done on remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units in accordance with subsection (www) of this section for inspection by the agency. For each installation, maintenance, adjustment and repair, the record shall include the date, description of the service, and name(s) of the individual(s) who performed the work.

(ggg) Safety procedures and instructions for remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units. A licensee shall do the following:

(1) secure the unit, the console, the console keys, and the treatment room when not in use or unattended;

(2) permit only individuals approved by the authorized user, RSO, or authorized medical physicist to be present in the treatment room during treatment with the sealed source(s);

(3) prevent dual operation of more than one radiation producing device in a treatment room if applicable;

(4) develop, implement, and maintain written procedures for responding to an abnormal situation when the operator is unable to place the sealed source(s) in the shielded position, or remove the patient or human research subject from the radiation field with controls from outside the treatment room. The procedures shall include the following and shall be physically located at the unit console:

(A) instructions for responding to equipment failures and the names of the individuals responsible for implementing corrective actions;

(B) the process for restricting access to and posting of the treatment area to minimize the risk of inadvertent exposure; and

(C) the names and telephone numbers of the authorized users, the authorized medical physicist, and the RSO to be contacted if the unit or console operates abnormally;

(5) post instructions at the unit console to inform the operator of the following:

(A) the location of the procedures required by paragraph (4) of this subsection; and

(B) the names and telephone numbers of the authorized users, the authorized medical physicist, and the RSO to be contacted if the unit or console operates abnormally;

(6) provide instruction initially and at least annually, to all individuals who operate the unit, as appropriate to the individual's assigned duties, to include:

(A) procedures identified in paragraph (4) of this subsection; and

(B) operating procedures for the unit;

(7) ensure that operators, authorized medical physicists, and authorized users participate in drills of the emergency procedures, initially and at least annually; and

(8) maintain records of individuals receiving instruction and participating in drills required by paragraphs (6) and (7) of this subsection in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) a list of the topics covered;

(B) date of the instruction or drill;

(C) name(s) of the attendee(s); and

(D) name(s) of the individual(s) who provided the instruction.

(hhh) Safety precautions for remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units. The licensee shall do the following:

(1) control access to the treatment room by a door at each entrance;

(2) equip each entrance to the treatment room with an electrical interlock system that will do the following:

(A) prevent the operator from initiating the treatment cycle unless each treatment room entrance door is closed;

(B) cause the sealed source(s) to be shielded promptly when an entrance door is opened; and

(C) prevent the sealed source(s) from being exposed following an interlock interruption until all treatment room entrance doors are closed and the sealed source(s) "on-off" control is reset at the console;

(3) require any individual entering the treatment room to assure, through the use of appropriate radiation monitors, that radiation levels have returned to ambient levels;

(4) except for low-dose remote afterloader units, construct or equip each treatment room with viewing and intercom systems to permit continuous observation of the patient or the human research subject from the treatment console during irradiation;

(5) for licensed activities where sealed sources are placed within the patient's or human research subject's body, only conduct treatments that allow for expeditious removal of a decoupled or jammed sealed source;

(6) in addition to the requirements specified in paragraphs (1) - (5) of this subsection, require the following:

(A) for low dose-rate, medium dose-rate, and pulsed dose-rate remote afterloader units:

(i) an authorized medical physicist, and either an authorized user or a physician, under the supervision of an authorized user, who has been trained in the operation and emergency response for the unit, be physically present during the initiation of all patient treatments involving the unit; and

(ii) an authorized medical physicist, and either an authorized user or an individual, under the supervision of an authorized user, who has been trained to remove the sealed source applicator(s) in the event of an emergency involving the unit, be immediately available during continuation of all patient treatments involving the unit;

(B) for high dose-rate remote afterloader units:

(i) an authorized user and an authorized medical physicist be physically present during the initiation of all patient treatments involving the unit; and

(ii) an authorized medical physicist, and either an authorized user or a physician, under the supervision of an authorized user, who has been trained in the operation and emergency response for the unit, be physically present during continuation of all patient treatments involving the unit;

(C) for gamma stereotactic radiosurgery units and teletherapy units, require that an authorized user and an authorized medical physicist be physically present throughout all patient treatments involving gamma stereotactic radiosurgery units and teletherapy units; and

(D) notify the RSO, or his or her designee, and an authorized user as soon as possible, if the patient or human research subject has a medical emergency or dies; and

(7) have applicable emergency response equipment available near each treatment room to respond to a sealed source that remains in the unshielded position or lodges within the patient following completion of the treatment.

(iii) Dosimetry equipment.

(1) Except for low dose-rate remote afterloader sealed sources where the sealed source output or activity is determined by the manufacturer, the licensee shall have a calibrated dosimetry system available for use. To satisfy this requirement, one of the following two conditions shall be met.

(A) The system shall have been calibrated using a system or sealed source traceable to the National Institute of Standards and Technology (NIST) and published protocols accepted by nationally recognized bodies; or by a calibration laboratory accredited by the American Association of Physicists in Medicine (AAPM). The calibration shall have been performed within the previous two years and after any servicing that may have affected system calibration.

(B) The system shall have been calibrated within the previous four years. Eighteen to 30 months after that calibration, the system shall have been intercompared with another dosimetry system that was calibrated within the past 24 months by NIST or by a calibration laboratory accredited by the AAPM. The results of the intercomparison shall have indicated that the calibration factor of the licensee's system had not changed by more than 2.0%. The licensee may not use the intercomparison result to change the calibration factor. When intercomparing dosimetry systems to be used for calibrating sealed sources for therapeutic unit, the licensee shall use a comparable unit with beam attenuators or collimators, as applicable, and sealed sources of the same radionuclide as the sealed source used at the licensee's facility.

(2) The licensee shall have available for use a dosimetry system for spot check output measurements, if such measurements are required by this section. To satisfy this requirement, the system may be compared with a system that has been calibrated in accordance with paragraph (1) of this subsection. This comparison shall have been performed within the previous year and after each servicing that may have affected system calibration. The spot check system may be the same system used to meet the requirements of paragraph (1) of this subsection.

(3) The licensee shall retain a record of each calibration, intercomparison, and comparison of dosimetry equipment in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the calibration;

(B) manufacturer's model and serial numbers of the instruments that were calibrated, intercompared, or compared;

(C) the correction factor that was determined from the calibration or comparison or the apparent correction factor that was determined from an intercomparison; and

(D) the names of the individuals who performed the calibration, intercomparison, or comparison.

(jjj) Full calibration measurements on teletherapy units.

(1) A licensee authorized to use a teletherapy unit for medical use shall perform full calibration measurements on each teletherapy unit as follows:

(A) before the first medical use of the unit;

(B) before medical use under any of the following conditions:

(i) whenever spot check measurements indicate that the output differs by more than 5.0% from the output obtained at the last full calibration corrected mathematically for radioactive decay;

(ii) following replacement of the sealed source or following reinstallation of the teletherapy unit in a new location;

(iii) following any repair of the teletherapy unit that includes removal of the sealed source or major repair of the components associated with the sealed source exposure assembly; and

(C) at intervals not to exceed one year.

(2) Full calibration measurements shall include determination of the following:

(A) the output within plus or minus 3.0% for the range of field sizes and for the distance or range of distances used for medical use;

(B) the coincidence of the radiation field and the field indicated by the light beam localizing device;

(C) uniformity of the radiation field and its dependence on the orientation of the useful beam;

(D) timer accuracy and linearity over the range of use;

(E) "on-off" error; and

(F) the accuracy of all distance measuring and localization devices in medical use.

(3) The licensee shall use the dosimetry system described in subsection (iii)(1) of this section to measure the output for one set of exposure conditions. The remaining radiation measurements required in paragraph (2)(A) of this subsection may be made using a dosimetry system that indicates relative dose rates.

(4) The licensee shall make full calibration measurements required by paragraph (1) of this subsection in accordance with published protocols accepted by nationally recognized bodies.

(5) The licensee shall mathematically correct the outputs determined in paragraph (2)(A) of this subsection for physical decay at intervals not to exceed one month for cobalt-60, six months for cesium-137, or at intervals consistent with 1.0% decay for all other nuclides.

(6) Full calibration measurements required by paragraph (1) of this subsection and physical decay corrections required by paragraph (5) of this subsection shall be performed by an authorized medical physicist.

(7) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the calibration;

(B) manufacturer's name, model number and serial number of the teletherapy unit's sealed source and the instruments used to calibrate the unit;

(C) results and an assessment of the full calibrations; and

(D) signature of the authorized medical physicist who performed the full calibration.

(kkk) Full calibration measurements on remote afterloader units.

(1) A licensee authorized to use a remote afterloader for medical use shall perform full calibration measurements on each unit as follows:

(A) before the first medical use of the unit;

(B) before medical use under any of the following conditions:

(i) following replacement of the sealed source;

(ii) following reinstallation of the unit in a new location outside the facility;

(iii) following any repair of the unit that includes removal of the sealed source or major repair of the components associated with the sealed source exposure assembly;

(C) at intervals not to exceed three months for high dose-rate, medium dose-rate, and pulsed dose-rate remote afterloader units with sealed sources whose half-life exceeds 75 days; and

(D) at intervals not to exceed one year for low dose-rate afterloader units.

(2) Full calibration measurements shall include, as applicable, determination of the following:

(A) the output within plus or minus 5.0%;

(B) sealed source positioning accuracy to within plus or minus 1 millimeter (mm);

(C) sealed source retraction with backup battery upon power failure;

(D) length of the sealed source transfer tubes;

(E) timer accuracy and linearity over the typical range of use;

(F) length of the applicators; and

(G) function of the sealed source transfer tubes, applicators, and transfer tube-applicator interfaces.

(3) A licensee shall use the dosimetry system described in subsection (iii)(1) of this section to measure the output.

(4) A licensee shall make full calibration measurements required by paragraph (1) of this subsection in accordance with published protocols accepted by nationally recognized bodies.

(5) In addition to the requirements for full calibrations for low dose-rate remote afterloader units in paragraph (2) of this subsection, a licensee shall perform an autoradiograph of the sealed source(s) to verify inventory and sealed source(s) arrangement at intervals not to exceed three months.

(6) For low dose-rate remote afterloader units, a licensee may use measurements provided by the sealed source manufacturer that are made in accordance with paragraphs (1) - (5) of this subsection.

(7) The licensee shall mathematically correct the outputs determined in paragraph (2)(A) of this subsection for physical decay at intervals consistent with 1.0% physical decay.

(8) Full calibration measurements required by paragraph (1) of this subsection and physical decay corrections required by paragraph (7) of this subsection shall be performed by an authorized medical physicist.

(9) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the calibration;

(B) manufacturer's name, model number and serial number of the remote afterloader unit's sealed source, and the instruments used to calibrate the unit;

(C) results and an assessment of the full calibrations;

(D) signature of the authorized medical physicist of this section; and

(E) results of the autoradiograph required for low dose-rate remote afterloader unit.

(lll) Full calibration measurements on gamma stereotactic radiosurgery units.

(1) A licensee authorized to use a gamma stereotactic radiosurgery unit for medical use shall perform full calibration measurements on each gamma stereotactic radiosurgery unit as follows:

(A) before the first medical use of the unit;

(B) before medical use under the following conditions:

(i) whenever spot check measurements indicate that the output differs by more than 5.0% from the output obtained at the last full calibration corrected mathematically for radioactive decay;

(ii) following replacement of the sealed sources or following reinstallation of the gamma stereotactic radiosurgery unit in a new location; and

(iii) following any repair of the gamma stereotactic radiosurgery unit that includes removal of the sealed sources or major repair of the components associated with the sealed source exposure assembly; and

(C) at intervals not to exceed one year, with the exception that relative helmet factors need only be determined before the first medical use of a helmet and following any damage to a helmet.

(2) Full calibration measurements shall include determination of the following:

(A) the output within plus or minus 3.0%;

(B) relative helmet factors;

(C) isocenter coincidence;

(D) timer accuracy and linearity over the range of use;

(E) "on-off" error;

(F) trunnion centricity;

(G) treatment table retraction mechanism, using backup battery power or hydraulic backups with the unit "off";

(H) helmet microswitches;

(I) emergency timing circuits; and

(J) stereotactic frames and localizing devices (trunnions).

(3) The licensee shall use the dosimetry system described in subsection (iii)(1) of this section to measure the output for one set of exposure conditions. The remaining radiation measurements required in paragraph (2)(A) of this subsection may be made using a dosimetry system that indicates relative dose rates.

(4) The licensee shall make full calibration measurements required by paragraph (1) of this subsection in accordance with published protocols accepted by nationally recognized bodies.

(5) The licensee shall mathematically correct the outputs determined in paragraph (2)(A) of this subsection at intervals not to exceed one month for cobalt-60 and at intervals consistent with 1.0% physical decay for all other radionuclides.

(6) Full calibration measurements required by paragraph (1) of this subsection and physical decay corrections required by paragraph (5) of this subsection shall be performed by an authorized medical physicist.

(7) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the calibration;

(B) manufacturer's name, model number, and serial number for the unit and the unit's sealed source and the instruments used to calibrate the unit;

(C) results and an assessment of the full calibration; and

(D) signature of the authorized medical physicist who performed the full calibration.

(mmm) Periodic spot checks for teletherapy units.

(1) A licensee authorized to use teletherapy units for medical use shall perform output spot checks on each teletherapy unit once in each calendar month that include determination of the following:

(A) timer constancy and linearity over the range of use;

(B) "on-off" error;

(C) the coincidence of the radiation field and the field indicated by the light beam localizing device;

(D) the accuracy of all distance measuring and localization devices used for medical use;

(E) the output for one typical set of operating conditions measured with the dosimetry system described in subsection (iii)(2) of this section; and

(F) the difference between the measurement made in subparagraph (E) of this paragraph and the anticipated output, expressed as a percentage of the anticipated output, the value obtained at last full calibration corrected mathematically for physical decay.

(2) The licensee shall perform measurements required by paragraph (1) of this subsection in accordance with written procedures established by an authorized medical physicist. That authorized medical physicist need not actually perform the spot check measurements. The licensee shall maintain a copy of the written procedures in accordance with subsection (www) of this section for inspection by the agency.

(3) The licensee authorized to use a teletherapy unit for medical use shall perform safety spot checks of each teletherapy facility once in each calendar month and after each sealed source installation to assure proper operation of the following:

(A) electrical interlocks at each teletherapy room entrance;

(B) electrical or mechanical stops installed for the purpose of limiting use of the primary beam of radiation (restriction of sealed source housing angulation or elevation, carriage or stand travel and operation of the beam "on-off" mechanism);

(C) sealed source exposure indicator lights on the teletherapy unit, on the control console, and in the facility;

(D) viewing and intercom systems;

(E) treatment room doors from inside and outside the treatment room; and

(F) electrically assisted treatment room doors with the teletherapy unit electrical power turned "off".

(4) The licensee shall have an authorized medical physicist review the results of each spot check and submit a written report to the licensee within 15 days of the spot check.

(5) If the results of the checks required in paragraph (3) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit except as may be necessary to repair, replace, or check the malfunctioning system.

(6) The licensee shall retain a record of each spot check required by paragraphs (1) and (3) of this subsection, in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the spot-check;

(B) manufacturer's name and model and serial number for the teletherapy unit, and sealed source and instrument used to measure the output of the teletherapy unit;

(C) assessment of timer linearity and constancy;

(D) calculated "on-off" error;

(E) determination of the coincidence of the radiation field and the field indicated by the light beam localizing device;

(F) the determined accuracy of each distance measuring and localization device;

(G) the difference between the anticipated output and the measured output;

(H) notations indicating the operability of each entrance door electrical interlock, each electrical or mechanical stop, each sealed source exposure indicator light, and the viewing and intercom system and doors;

(I) name of the individual who performed the periodic spot-check; and

(J) the signature of the authorized medical physicist who reviewed the record of the spot check.

(nnn) Periodic spot checks for remote afterloader units.

(1) A licensee authorized to use a remote afterloader unit for medical use shall perform spot checks of each remote afterloader facility and on each unit as follows:

(A) before the first use each day of use of a high dose-rate, medium dose-rate, or pulsed dose-rate remote afterloader unit;

(B) before each patient treatment with a low dose-rate remote afterloader unit; and

(C) after each sealed source installation.

(2) The licensee shall perform the measurements required by paragraph (1) of this subsection in accordance with written procedures established by an authorized medical physicist. That individual need not actually perform the spot check measurements. The licensee shall maintain a copy of the written procedures in accordance with subsection (www) of this section for inspection by the agency.

(3) The licensee shall have an authorized medical physicist review the results of each spot check and submit a written report to the licensee within 15 days of the spot check.

(4) To satisfy the requirements of paragraph (1) of this subsection, spot checks shall, at a minimum, assure proper operation of the following:

(A) electrical interlocks at each remote afterloader unit room entrance;

(B) sealed source exposure indicator lights on the remote afterloader unit, on the control console, and in the facility;

(C) viewing and intercom systems in each high dose-rate, medium dose-rate, and pulsed dose-rate remote afterloader facility;

(D) emergency response equipment;

(E) radiation monitors used to indicate the sealed source position;

(F) timer accuracy;

(G) clock (date and time) in the unit's computer; and

(H) decayed sealed source(s) activity in the unit's computer.

(5) If the results of the checks required in paragraph (4) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit except as may be necessary to repair, replace, or check the malfunctioning system.

(6) The licensee shall maintain a record, in accordance with subsection (www) of this section for inspection by the agency, of each check required by paragraph (4) of this subsection. The record shall include the following, as applicable:

(A) date of the spot-check;

(B) manufacturer's name and model and serial number for the remote afterloader unit and sealed source;

(C) an assessment of timer accuracy;

(D) notations indicating the operability of each entrance door electrical interlock, radiation monitors, sealed source exposure indicator lights, viewing and intercom systems, clock, and decayed sealed source activity in the unit's computer;

(E) name of the individual who performed the periodic spot-check; and

(F) the signature of an authorized medical physicist who reviewed the record of the spot-check.

(ooo) Periodic spot checks for gamma stereotactic radiosurgery units.

(1) A licensee authorized to use a gamma stereotactic radiosurgery unit for medical use shall perform spot checks of each gamma stereotactic radiosurgery facility and on each unit as follows:

(A) monthly;

(B) before the first use of the unit on each day of use; and

(C) after each source installation.

(2) The licensee shall perform the measurements required by paragraph (1) of this subsection in accordance with written procedures established by an authorized medical physicist with a specialty in therapeutic radiological physics. That individual need not actually perform the spot check measurements. The licensee shall maintain a copy of the written procedures in accordance with subsection (www) of this section for inspection by the agency.

(3) The licensee shall have an authorized medical physicist review the results of each spot check and submit a written report to the licensee within 15 days of the spot check.

(4) To satisfy the requirements of paragraph (1)(A) of this subsection, spot checks shall, at a minimum, achieve the following by:

(A) assurance of proper operation of these items:

(i) treatment table retraction mechanism, using backup battery power or hydraulic backups with the unit "off;"

(ii) helmet microswitches;

(iii) emergency timing circuits; and

(iv) stereotactic frames and localizing devices (trunnions); and

(B) determination of the following:

(i) the output for one typical set of operating conditions measured with the dosimetry system described in subsection (iii)(2) of this section;

(ii) the difference between the measurement made in clause (i) of this subparagraph and the anticipated output, expressed as a percentage of the anticipated output, (i.e., the value obtained at last full calibration corrected mathematically for physical decay);

(iii) sealed source output against computer calculation;

(iv) timer accuracy and linearity over the range of use;

(v) "on-off" error; and

(vi) trunnion centricity.

(5) To satisfy the requirements of paragraph (1)(B) and (C) of this subsection, spot checks shall assure proper operation of the following:

(A) electrical interlocks at each gamma stereotactic radiosurgery room entrance;

(B) sealed source exposure indicator lights on the gamma stereotactic radiosurgery unit, on the control console, and in the facility;

(C) viewing and intercom systems;

(D) timer termination;

(E) radiation monitors used to indicate room exposures; and

(F) emergency "off" buttons.

(6) The licensee shall arrange for prompt repair of any system identified in paragraph (4) of this subsection that is not operating properly.

(7) If the results of the checks required in paragraph (5) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit except as may be necessary to repair, replace, or check the malfunctioning system.

(8) The licensee shall retain a record of each check required by paragraphs (4) and (5) of this subsection in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of the spot check;

(B) manufacturer's name, and model and serial number for the gamma stereotactic radiosurgery unit and the instrument used to measure the output of the unit;

(C) an assessment of timer linearity and accuracy;

(D) the calculated "on-off" error;

(E) a determination of trunnion centricity;

(F) the difference between the anticipated output and the measured output;

(G) an assessment of sealed source output against computer calculations;

(H) notations indicating the operability of radiation monitors, helmet microswitches, emergency timing circuits, emergency "off" buttons, electrical interlocks, sealed source exposure indicator lights, viewing and intercom systems, timer termination, treatment table retraction mechanism, and stereotactic frames and localizing devices (trunnions);

(I) the name of the individual who performed the periodic spot check; and

(J) the signature of an authorized medical physicist who reviewed the record of the spot check.

(ppp) Additional technical requirements for mobile remote afterloader units.

(1) A licensee providing mobile remote afterloader service shall do the following:

(A) check survey instruments before medical use at each address of use or on each day of use, whichever is more frequent; and

(B) account for all sealed sources before departure from a client's address of use.

(2) In addition to the periodic spot checks required by subsection (nnn) of this section, a licensee authorized to use remote afterloaders for medical use shall perform checks on each remote afterloader unit before use at each address of use. At a minimum, checks shall be made to verify the operation of the following:

(A) electrical interlocks on treatment area access points;

(B) sealed source exposure indicator lights on the remote afterloader unit, on the control console, and in the facility;

(C) viewing and intercom systems;

(D) applicators, sealed source transfer tubes, and transfer tube-applicator interfaces;

(E) radiation monitors used to indicate room exposures;

(F) sealed source positioning (accuracy); and

(G) radiation monitors used to indicate whether the sealed source has returned to a safe shielded position.

(3) In addition to the requirements for checks in paragraph (2) of this subsection, the licensee shall ensure overall proper operation of the remote afterloader unit by conducting a simulated cycle of treatment before use at each address of use.

(4) If the results of the checks required in paragraph (2) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit except as may be necessary to repair, replace, or check the malfunctioning system.

(5) The licensee shall maintain a record for inspection by the agency, in accordance with subsection (www) of this section, of each check required by subparagraph (B) of this paragraph. The record shall include the following:

(A) date of the check;

(B) manufacturer's name, model number and serial number of the remote afterloader unit;

(C) notations accounting for all sealed sources before the licensee departs from a facility;

(D) notations indicating the operability of each entrance door electrical interlock, radiation monitors, sealed source exposure indicator lights, viewing and intercom system, applicators and sealed source transfer tubes, and sealed source positioning accuracy; and

(E) the signature of the individual who performed the check.

(qqq) Radiation surveys.

(1) In addition to the survey requirements of §289.202(p) of this title, a person licensed to use sealed sources in this section shall make surveys to ensure that the maximum radiation levels and average radiation levels, from the surface of the main sealed source safe with the sealed source(s) in the shielded position, do not exceed the levels stated in the Sealed Source and Device Registry.

(2) The licensee shall make the survey required by paragraph (1) of this subsection at installation of a new sealed source and following repairs to the sealed source(s) shielding, the sealed source(s) driving unit, or other electronic or mechanical component that could expose the sealed source, reduce the shielding around the sealed source(s), or compromise the radiation safety of the unit or the sealed source(s).

(3) The licensee shall maintain a record for inspection by the agency, in accordance with subsection (www) of this section, of the radiation surveys required by paragraph (1) of this subsection. The record shall include:

(A) date of the measurements;

(B) manufacturer's name, model number and serial number of the treatment unit, sealed source, and instrument used to measure radiation levels;

(C) each dose rate measured around the sealed source while the unit is in the "off" position and the average of all measurements; and

(D) the signature of the individual who performed the test.

(rrr) Five-year inspection for teletherapy and gamma stereotactic radiosurgery units.

(1) The licensee shall have each teletherapy unit and gamma stereotactic radiosurgery unit fully inspected and serviced during sealed source replacement or at intervals not to exceed five years, whichever comes first, to assure proper functioning of the sealed source exposure mechanism.

(2) This inspection and servicing may only be performed by persons specifically licensed to do so by the agency, the NRC, an agreement state, or licensing state.

(3) The licensee shall maintain a record of the inspection and servicing in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) date of inspection;

(B) manufacturer's name and model and serial number of both the treatment unit and the sealed source;

(C) a list of components inspected and serviced, and the type of service; and

(D) the radioactive material license number and the signature of the individual performing the inspection.

(sss) Therapy-related computer systems. The licensee shall perform acceptance testing on the treatment planning system of therapy-related computer systems in accordance with published protocols accepted by nationally recognized bodies. At a minimum, the acceptance testing shall include, as applicable, verification of the following:

(1) the sealed source-specific input parameters required by the dose calculation algorithm;

(2) the accuracy of dose, dwell time, and treatment time calculations at representative points;

(3) the accuracy of isodose plots and graphic displays;

(4) the accuracy of the software used to determine sealed source positions from radiographic images; and

(5) the accuracy of electronic transfer of the treatment delivery parameters to the treatment delivery unit from the treatment planning system.

(ttt) Training for use of remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of a sealed source for a use authorized in subsection (ddd) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC, an agreement state, or licensing state and who meets the requirements of paragraphs (2)(D) and (3) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, an agreement state, or licensing state will be posted on the agency's web page, www.dshs.state.tx.us/radiation). To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) successfully complete a minimum of three years of residency training in a radiation therapy program approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Post-Graduate Training of the American Osteopathic Association; and

(B) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, treatment planning, quality assurance, and clinical use of stereotactic radiosurgery, remote afterloaders and external beam therapy; or

(2) has completed a structured educational program in basic radionuclide handling techniques applicable to the use of a sealed source in a therapeutic medical unit including:

(A) 200 hours of classroom and laboratory training in the following areas:

(i) radiation physics and instrumentation;

(ii) radiation protection;

(iii) mathematics pertaining to the use and measurement of radioactivity; and

(iv) radiation biology; and

(B) 500 hours of work experience, under the supervision of an authorized user who meets the requirements of this subsection at a medical institution involving the following:

(i) reviewing full calibration measurements and periodic spot checks;

(ii) preparing treatment plans and calculating treatment times;

(iii) using administrative controls to prevent a medical event involving the use of radioactive material;

(iv) implementing emergency procedures to be followed in the event of the abnormal operation of a medical unit or console;

(v) checking and using survey meters; and

(vi) selecting the proper dose and how it is to be administered; and

(C) has completed three years of supervised clinical experience in radiation therapy, under an authorized user who meets the requirements of this subsection as part of a formal training program approved by the Residency Review Committee for Radiation Oncology of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Postdoctoral Training of the American Osteopathic Association. This experience may be obtained concurrently with the supervised work experience required by subparagraph (B) of this paragraph; and

(D) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraphs (1)(A) or (2), and (3) of this subsection, and has achieved a level of competency sufficient to function independently as an authorized user of each type of therapeutic medical unit for which the individual is requesting authorized user status. The written attestation shall be signed by a preceptor authorized user who meets the requirements in this subsection; and

(3) has received training in device operation, safety procedures, and clinical use for the type(s) of use for which authorization is sought. This training requirement may be satisfied by satisfactory completion of a training program provided by the vendor for new users or by receiving training supervised by an authorized user or authorized medical physicist, as appropriate, who is authorized for the type(s) of use for which the individual is seeking authorization.

(uuu) Report and notification of a medical event.

(1) The licensee shall report any event, except for events that result from intervention by a patient or human research subject, in which the administration of radioactive material, or radiation from radioactive material, results in the following:

(A) a dose that differs from the prescribed dose or dose that would have resulted from the prescribed dosage by more than 5 rem (0.05 Sievert (Sv)) effective dose equivalent, 50 rem (0.5 Sv) to an organ or tissue, or 50 rem (0.5 Sv) shallow dose equivalent to the skin and either:

(i) the total dose delivered differs from the prescribed dose by 20% or more;

(ii) the total dosage delivered differs from the prescribed dosage by 20% or more or falls outside the prescribed dosage range; or

(iii) the fractionated dose delivered differs from the prescribed dose, for a single fraction, by 50% or more;

(B) a dose that exceeds 5 rem (0.05 Sv) effective dose equivalent, 50 rem (0.5 Sv) to an organ or tissue, or 50 rem (0.5 Sv) shallow dose equivalent to the skin from any of the following:

(i) an administration of a wrong radioactive drug containing radioactive material;

(ii) an administration of a radioactive drug containing radioactive material by the wrong route of administration;

(iii) an administration of a dose or dosage to the wrong individual or human research subject;

(iv) an administration of a dose or dosage delivered by the wrong mode of treatment; or

(v) a leaking sealed source; or

(C) a dose to the skin or an organ or tissue other than the treatment site that exceeds by 50 rem (0.5 Sv) to an organ or tissue and 50% or more of the dose expected from the administration defined in the written directive (excluding, for permanent implants, seeds that were implanted in the correct site but migrated outside the treatment site).

(2) The licensee shall report any event resulting from intervention of a patient or human research subject in which the administration of radioactive material, or radiation from radioactive material, results or will result in an unintended permanent functional damage to an organ or a physiological system, as determined by a physician.

(3) The licensee shall notify the agency by telephone no later than the next calendar day after discovery of the medical event.

(4) The licensee shall submit a written report to the agency within 15 calendar days after discovery of the medical event. The written report shall include the following, excluding the individual's name or any other information that could lead to identification of the individual:

(A) the licensee's name and radioactive material license number;

(B) the name of the prescribing physician;

(C) a brief description of the medical event;

(D) why the event occurred;

(E) the effect, if any, on the individual(s) who received the administration;

(F) actions, if any, that have been taken, or are planned, to prevent recurrence; and

(G) certification that the licensee notified the individual (or the individual's responsible relative or guardian), and if not, why not.

(5) The licensee shall notify the referring physician and also notify the individual who is the subject of the medical event no later than 24 hours after its discovery, unless the referring physician personally informs the licensee either that he or she will inform the individual or that, based on medical judgment, telling the individual would be harmful. The licensee is not required to notify the individual without first consulting the referring physician. If the referring physician or the affected individual cannot be reached within 24 hours, the licensee shall notify the individual as soon as possible thereafter. The licensee shall not delay any appropriate medical care for the individual, including any necessary remedial care as a result of the medical event, because of any delay in notification. To meet the requirements of this subsection, the notification of the individual who is the subject of the medical event may be made instead to that individual's responsible relative or guardian. If a verbal notification is made, the licensee shall inform the individual or appropriate responsible relative or guardian, that a written description of the event can be obtained from the licensee upon request. The licensee shall provide the written description if requested.

(6) Aside from the notification requirement, nothing in this section affects any rights or duties of licensees and physicians in relation to each other, to individuals affected by the medical event, or to that individual's responsible relatives or guardians.

(7) The licensee shall annotate a copy of the report provided to the agency with the following information:

(A) the name of the individual who is the subject of the event; and

(B) a unique identification number of the individual who is the subject of the event.

(8) The licensee shall provide a copy of the annotated report to the referring physician, if other than the licensee, no later than 15 calendar days after the discovery of the event.

(9) The licensee shall retain a copy of the annotated report of the medical event in accordance with subsection (www) of this section for inspection by the agency.

(vvv) Report and notification of a dose to an embryo/fetus or nursing child.

(1) The licensee shall report any dose to an embryo/fetus that is greater than 5 rem (50 mSv) dose equivalent that is a result of an administration of radioactive material or radiation from radioactive material to a pregnant individual, unless the dose to the embryo/fetus was specifically approved, in advance, by the authorized user.

(2) The licensee shall report any dose to a nursing child that is a result of an administration of radioactive material to a breast feeding individual that:

(A) is greater than 5 rem (50 mSv) TEDE; or

(B) has resulted in unintended permanent functional damage to an organ or a physiological system, as determined by a physician.

(3) The licensee shall notify the agency by telephone no later than the next calendar day after discovery of a dose to the embryo/fetus or nursing child that requires a report in accordance with paragraphs (1) or (2) of this subsection.

(4) The licensee shall submit a written report to the agency no later than 15 calendar days after discovery of a dose to the embryo/fetus or nursing child that requires a report in accordance with paragraphs (1) or (2) of this subsection. The written report shall include the following, excluding the individual's or child's name or any other information that could lead to identification of the individual or child:

(A) the licensee's name and radioactive material license number;

(B) the name of the prescribing physician;

(C) a brief description of the event;

(D) why the event occurred;

(E) the effect, if any, on the embryo/fetus or the nursing child;

(F) actions, if any, that have been taken, or are planned, to prevent recurrence; and

(G) certification that the licensee notified the pregnant individual or mother (or the mother's or child's responsible relative or guardian), and if not, why not.

(5) The licensee shall notify the referring physician and also notify the pregnant individual or mother, both hereafter referred to as the mother, no later than 24 hours after discovery of an event that would require reporting in accordance with paragraphs (1) or (2) of this subsection, unless the referring physician personally informs the licensee either that he or she will inform the mother or that, based on medical judgment, telling the mother would be harmful. The licensee is not required to notify the mother without first consulting with the referring physician. If the referring physician or mother cannot be reached within 24 hours, the licensee shall make the appropriate notifications as soon as possible thereafter. The licensee may not delay any appropriate medical care for the embryo/fetus or for the nursing child, including any necessary remedial care as a result of the event, because of any delay in notification. To meet the requirements of this subsection, the notification may be made to the mother's or child's responsible relative or guardian instead of the mother, when appropriate. If a verbal notification is made, the licensee shall inform the mother, or the mother's or child's responsible relative or guardian, that a written description of the event can be obtained from the licensee upon request. The licensee shall provide such a written description if requested.

(6) The licensee shall annotate a copy of the report provided to the agency with the following information:

(A) the name of the individual or the nursing child who is the subject of the event; and

(B) a unique identification number of the pregnant individual or the nursing child who is the subject of the event.

(7) The licensee shall provide a copy of the annotated report as described in paragraph (6) of this subsection to the referring physician, if other than the licensee, no later than 15 days after the discovery of the event.

(8) The licensee shall retain a copy of the annotated report as described in paragraph (6) of this subsection of a dose to an embryo/fetus or a nursing child in accordance with subsection (www) of this section for inspection by the agency.

(www) Records/documents for agency inspection. Each licensee shall maintain copies of the following records/documents at each authorized use site and make them available to the agency for inspection, upon reasonable notice.
Figure: 25 TAC §289.256(www)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 29, 2008.

TRD-200806703
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 18, 2009
Proposal publication date: July 11, 2008
For further information, please call: (512) 458-7111 x6972

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION, PLACEMENT, AND PROGRAM COMPLETION

SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.25

The Texas Youth Commission adopts an amendment to §85.25, concerning Minimum Length of Stay/Minimum Period of Confinement, with changes to the proposed text as published in the November 21, 2008, issue of the *Texas Register* (33 TexReg 9445). Changes to the proposed text consist of a minor change to subsection (i)(1) in order to allow for greater flexibility in the methods by which a petition to reduce a youth's assigned minimum length of stay may reach the Executive Commissioner.

The justification for amending the rule is providing for a minimum length of stay that is more directly associated with a youth's rehabilitation needs and protection of the public. The amended rule establishes a minimum length of stay assignment system that accounts for the severity of the committing offense, as well as certain criminogenic factors in a youth's history that address the danger posed to the community. The minimum length of stay will no longer be determined solely by the youth's committing offense.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.062, which requires the commission to consider the nature and seriousness of the conduct engaged in by the child and the danger the child poses to the community when establishing the minimum length of stay.

§85.25. Minimum Length of Stay/Minimum Period of Confinement.

(a) Purpose. This rule establishes a minimum period of time youth will spend in high or medium restriction placements.

(b) Applicability.

(1) This policy applies only to:

(A) youth who are committed to the Texas Youth Commission (TYC) on or after February 1, 2009; and

(B) youth whose parole is revoked on or after February 1, 2009, regardless of the commitment date.

(2) Youth who were committed to TYC and/or whose parole was revoked prior to February 1, 2009 remain subject to provisions of this rule in effect at the time of the commitment or revocation.

(c) Definitions.

(1) Assessment Rating Level--a score derived from evidence-based criminogenic factors in a youth's history used to assess the danger a youth poses to the community.

(2) Committing Offense--the offense on which the initial minimum length of stay assessment is based. It is the most serious of the relevant offenses found at the youth's commitment proceeding and any probated offense(s) modified by the commitment order.

(3) Federal Offenses--youth who have committed federal offenses and are sent to TYC by federal courts. If a committing of-

fense is a violation of a federal statute, the offense will be treated as a violation of a state statute which prohibits the same conduct as the relevant federal offense.

(4) Minimum Length of Stay--the predetermined minimum period of time established by TYC that a youth will be assigned to live in a high or medium restriction placement.

(5) Minimum Period of Confinement--the predetermined minimum period of time established by law that a youth committed to TYC on a determinate sentence must remain confined in a high restriction placement.

(6) Most Serious Relevant Offense--the offense that carries the most severe consequences which are, from most to least severe:

(A) an offense which carries a determinate sentence;

(B) the offense for which the designated minimum length of stay will produce the longest time in the physical custody of TYC;

(C) the offense which requires the highest level of restriction in placement;

(D) the offense which carries the most severe criminal penalty; and

(E) the most recently adjudicated offense.

(7) Revocation Offense--the offense on which a youth's minimum length of stay is based following a parole revocation hearing. It is the most serious of the relevant offenses found at a parole revocation hearing.

(8) Sentenced Offender--a youth sent to TYC under the provisions of the Determinate Sentence Act, as codified by the Texas Family Code.

(9) Severity of Offense--the degree of an offense as defined by the Texas Penal Code or relevant federal statute and any of the following applicable aggravating factors:

(A) sex offense as identified in §62.001 of the Texas Code of Criminal Procedure;

(B) felony against a person;

(C) possession or use of a firearm during the commission of the committing offense.

(d) Minimum Length of Stay.

(1) Minimum Length of Stay Assigned upon Commitment. The initial minimum length of stay applies only to non-sentenced offenders. The initial minimum length of stay is calculated based on the severity of the committing offense and an assessment of the danger the youth poses to the community.

(A) Youth whose committing offense is of high severity will be assigned the following minimum length of stay:

(i) 24 months, for youth with a high assessment rating level;

(ii) 18 months, for youth with a medium assessment rating level; or

(iii) 15 months, for youth with a low assessment rating level.

(B) Youth whose committing offense is of moderate severity will be assigned the following minimum length of stay:

(i) 15 months, for youth with a high assessment rating level;

(ii) 12 months, for youth with a medium assessment rating level; or

(iii) 12 months, for youth with a low assessment rating level.

(C) Youth whose committing offense is of low severity will be assigned the following minimum length of stay:

(i) 12 months, for youth with a high assessment rating level;

(ii) 9 months, for youth with a medium assessment rating level; or

(iii) 9 months, for youth with a low assessment rating level.

(2) Minimum Length of Stay Assigned upon Parole Revocation.

(A) A minimum length of stay may also be assigned by a TYC administrative law judge during a parole revocation hearing. This type of minimum length of stay may be assigned to sentenced offenders or non-sentenced offenders. The minimum length of stay will be based on the revocation offense proven at the hearing. Youth whose parole is revoked will be assigned the following minimum length of stay:

(i) 9 months, for youth found to have engaged in felony level conduct;

(ii) 6 months, for youth found to have broken a federal, state, or other law that is not a felony grade offense; or

(iii) 3 months, for youth found to have violated a condition of parole that is not also a violation of law.

(B) A designated minimum length of stay may be reduced by the administrative law judge if extenuating circumstances to the offense are found at the parole revocation hearing.

(e) Minimum Period of Confinement. The minimum period of confinement applies only to sentenced offenders. The minimum period of confinement is:

(1) ten years for youth sentenced for capital murder;

(2) three years for youth sentenced for an aggravated controlled substance felony or a felony of the first degree;

(3) two years for a felony of the second degree; and

(4) one year for a felony of the third degree.

(f) Creditable Time for Non-Sentenced Offenders.

(1) Upon admission, the minimum length of stay shall be counted from the first day a youth reaches any TYC operated or assigned facility.

(2) On recommitment, the minimum length of stay shall be counted from the first day a youth reaches any TYC operated or assigned facility, and shall run concurrently with any incomplete minimum length of stay requirements.

(A) A youth who is recommitted for the same conduct following an appeal of the original commitment shall be given credit toward completion of the new minimum length of stay for any time spent in TYC custody as a result of the original commitment; or

(B) A youth who is recommitted for the same conduct for which a Level I hearing has already been held shall be given credit toward completion of the new minimum length of stay for the time already served as a result of that hearing.

(3) After the count begins, all time spent in program, on furlough or in detention or jail (except as a disposition in a criminal case) will be counted toward meeting a minimum length of stay requirement.

(4) Time spent as an escapee from a TYC placement or time spent in jail or a court ordered placement in an adult correctional residential program as disposition in a criminal case shall not be counted toward meeting the minimum length of stay requirement.

(g) Creditable Time for Sentenced Offenders.

(1) For sentenced offenders committed prior to June 9, 2007, the minimum period of confinement shall be counted from the first day a youth reaches any TYC residential placement.

(2) For sentenced offenders committed on or after June 9, 2007, credit shall be granted toward completion of the minimum period of confinement for time spent in a secure detention facility in connection with the committing case prior to admission to TYC.

(3) Regardless of the date of commitment:

(A) once a youth reaches a TYC placement and is credited with any applicable time in detention, only time spent in a TYC residential placement shall be credited toward completion of the minimum period of confinement; and

(B) credit shall be granted toward completion of the sentence for time spent in a secure detention facility in connection with the committing case prior to admission to TYC.

(h) Concurrent Commitments. If a youth is committed to TYC under both determinate and indeterminate commitment orders, the determinate commitment order will have precedence.

(1) The minimum period of confinement and minimum length of stay will run concurrently. The youth will be managed as a sentenced offender until discharged from the determinate commitment.

(2) If a youth completes the determinate sentence prior to meeting discharge criteria for the indeterminate commitment, the youth will be:

(A) discharged from the determinate commitment;

(B) reassessed for rehabilitation needs under the indeterminate commitment; and

(C) required to serve any remaining minimum length of stay associated with the indeterminate commitment.

(i) Reductions to Minimum Length of stay.

(1) The minimum length of stay requirement may be reduced by the TYC executive commissioner when it is determined that the minimum length of stay is not justified because of the nature of the offense and offense history or when it is determined that the youth has made sufficient progress in treatment programs.

(2) Upon recommendation by the facility administrator, the division director over residential services may reduce a youth's minimum length of stay up to three months due to positive progress in treatment programs so long as the youth serves at least nine months in a residential placement.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2008.

TRD-200806671
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Effective date: February 1, 2009
Proposal publication date: November 21, 2008
For further information, please call: (512) 424-6014

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.208, §19.216

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §19.208 and §19.216 in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification. The amendment to §19.208 is adopted with changes to the proposed text published in the August 8, 2008, issue of the *Texas Register* (33 TexReg 6341). The amendment to §19.216 is adopted without changes to the proposed text.

The amendments are adopted in part, to implement Senate Bill 1318, 80th Legislature, Regular Session, 2007, which amended Texas Health and Safety Code, §242.034. Texas Health and Safety Code, §242.034, was amended to allow DADS to assess a late fee against a license holder for late submission of a renewal application. The amendments also update rule language to provide for the assessment of a late fee instead of an administrative penalty.

The adoption also updates agency names and rule cross-references.

Changes were made to the text of §19.208(b) and (c) to clarify and improve the accuracy of the section. In particular, "file" was changed to "submit" for consistency within the section.

DADS received no comments regarding adoption of the amendments.

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall

study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

§19.208. Renewal Procedures and Qualifications.

(a) Each license issued under this chapter must be renewed every two years. Each license expires two years from the date issued. A license issued under this chapter is not automatically renewed.

(b) Each license holder must, no later than the 45th day before the expiration of the current license, submit an application for renewal with DADS. DADS considers that an individual has submitted a timely and sufficient application for the renewal of a license if the license holder submits:

(1) a complete application to DADS, and DADS receives the complete application no later than the 45th day before the expiration date of the current license;

(2) an incomplete application to DADS with a letter explaining the circumstances which prevented the inclusion of the missing information, and DADS receives the incomplete application and letter no later than the 45th day before the expiration date of the current license; or

(3) a complete application or an incomplete application with a letter explaining the circumstances which prevented the inclusion of the missing information to DADS, DADS receives the application during the 45-day period ending on the date the current license expires, and the license holder pays the late fee established in §19.216(a)(6) of this chapter (relating to License Fees) in addition to the basic renewal fee.

(c) If the application is postmarked by the submission deadline, the application will be considered timely if received in DADS' Licensing and Credentialing Section, Regulatory Services Division within 15 days after the postmark.

(d) The appropriate license fee must be paid upon submission of the renewal application.

(e) The renewal of a license may be denied for the same reasons an original application for a license may be denied. See §19.214 of this subchapter (relating to Criteria for Denying a License or Renewal of a License).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2008.

TRD-200806667
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 15, 2009
Proposal publication date: August 8, 2008
For further information, please call: (512) 438-3734

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CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR RELATED CONDITIONS

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§90.15, 90.19, 90.192, 90.236, and 90.240 in Chapter 90, Intermediate Care Facilities for Persons with Mental Retardation or Related Conditions. The amendment to §90.15 is adopted with changes to the proposed text published in the August 1, 2008, issue of the *Texas Register* (33 TexReg 6096). The amendments to §§90.19, 90.192, 90.236, and 90.240 are adopted without changes to the proposed text.

The amendments are adopted to implement provisions of Senate Bill (SB) 1318 and SB 344, 80th Legislature, Regular Session, 2007. SB 1318 amended Texas Health and Safety Code, §252.034, to provide that a license holder who submits an application for license renewal later than the 45th day before the expiration of a current license is subject to a late fee in an amount equal to one-half of the basic renewal fee. SB 1318 also amended Texas Health and Safety Code, §252.065, to add violations for which DADS may assess an administrative penalty and for which DADS is not required to provide the facility time to correct prior to assessment of that penalty.

SB 344 amended Texas Health and Safety Code, §252.044, to require that DADS hold an exit conference in person if additional violations are identified after an initial exit conference. SB 344 also amended Texas Health and Safety Code, §252.044, to change the time period for a facility to submit a plan of correction for licensure violations from 10 calendar days to 10 working days after the facility receives a final, official statement of violations.

DADS received no comments regarding adoption of the amendments. However, §90.15(b)(3) is being changed to allow a license holder to submit to DADS an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information if DADS receives the application during the 45-day period ending on the date the current license expires. In §90.15(b) and (c), words related to "filing" an application are being changed to reflect "submission" of an application for consistency within the section.

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §90.15, §90.19

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 252, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of intermediate care facilities for persons with mental retardation.

§90.15. Renewal Procedures and Qualifications.

(a) Each license issued under this chapter must be renewed every two years. Each license expires two years from the date issued. A license issued under this chapter is not automatically renewed.

(b) Each license holder must, at least 45 days before the expiration of the current license, submit an application for renewal with DADS. DADS considers that an individual has submitted a timely and sufficient application for the renewal of a license if the license holder:

(1) submits a complete application to DADS, and DADS receives the complete application at least 45 days before the current license expires;

(2) submits an incomplete application to DADS with a letter explaining the circumstances which prevented the inclusion of the missing information, and DADS receives the incomplete application and letter at least 45 days before the current license expires; or

(3) submits a complete application or incomplete application with a letter explaining the circumstances which prevented the inclusion of the missing information to DADS, DADS receives the application during the 45-day period ending on the date the current license expires, and the license holder pays the late renewal fee established in §90.19(a)(4) of this subchapter (relating to License Fees) in addition to the basic renewal fee.

(c) If the application is postmarked by the submission deadline, the application will be considered to be timely if received by DADS' Regulatory Services Licensing and Credentialing Section within 15 days after the postmark. If the application is postmarked by the submission deadline, the application will be considered to be timely if received in DADS' Regulatory Services Licensing and Credentialing Section, within 30 days after the postmark and the license holder proves to the satisfaction of the department that the delay was due to the fault of the United States Postal Service. It is the responsibility of the license holder to ensure that his application is timely received by DADS.

(d) The appropriate license fee must be paid upon submission of the renewal application.

(e) The renewal of a license may be denied for the same reasons an original application for a license may be denied. See §90.17 of this subchapter (relating to Criteria for Denying a License or Renewal of a License).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200806668
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 15, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER F. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §90.192

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 252, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of intermediate care facilities for persons with mental retardation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200806669
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER H. ENFORCEMENT

40 TAC §90.236, §90.240

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 252, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of intermediate care facilities for persons with mental retardation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts new §§92.1 - 92.6; 92.11 - 92.20, 92.54; and 92.551 and the repeal of §§92.2 - 92.4; 92.10 - 92.23; 92.551 - 92.595; and 92.601 - 92.616 in Chapter 92, Licensing Standards for Assisted Living Facilities. New §§92.1 - 92.3, 92.5, 92.11, 92.14 - 92.18, and §92.551 are adopted with changes to the proposed text published in the August 1, 2008, issue of the *Texas Register* (33 TexReg 6101). New §§92.4, 92.6, 92.12, 92.13, 92.19, 92.20, 92.54 and the repeal of §§92.2 - 92.4; 92.10 - 92.23; 92.54; 92.551 - 92.595; and 92.601 - 92.616 are adopted without changes to the proposed text and will not be republished.

The new sections and repeal are adopted, in part, to implement some of the provisions of Senate Bill (SB) 1318, 80th Legislature, Regular Session, 2007, which amended the Texas Health and Safety Code, Chapter 247. The rules are rewritten to update agency names, rule citations, and definitions; clarify criteria for licensing; reflect current application procedures; and reorganize the rules to place them in a more logical order.

Several changes were made to §92.2. Specifically, the definition of "applicant" was reworded slightly in §92.2(5). The definition of "bedfast" was removed from §92.2. "And in the facility while on duty" was added to the definition of "immediately available" in §92.2(23). "Transportation" was added to a list of service contracts that are not considered "management services" in §92.2(26). The definition for "ombudsman" was amended in §92.2(33) to include a reference to the current definition in §85.2 of this title. The definition for "outside resource" was removed from the section. The phrase "by a person licensed to administer medications" was added to the definition of "personal care services" in §92.2(36) to clarify that a person must be licensed to administer medication.

New §92.3(b) and (e) were changed to add a cross reference to evacuation requirements that a resident in a Type A or Type E facility must meet. In addition, §92.3(e) was changed to clarify and improve the accuracy of the section.

Section 92.5 was changed to delete "outside resource" and in its place, "a home and community support services agency licensed under Chapter 142 or with an independent health professional" was added to use language in Texas Health and Safety Code, §247.067(c).

Section 92.11(c)(1)(A)(iii) was changed to add "based on an on-site inspection by DADS," which provides clarification about the inspection in accordance with the Life Safety Code (LSC). In addition, "staff" was deleted from §92.11(c)(1)(B) because it is not necessary to the rule.

Section 92.11 was changed to add new subsection (e) and new paragraph (h)(9), which were inadvertently left out of the proposal but are provisions in the current assisted living facility licensing rules. Minor edits were made to the section and the section was relettered to reflect the addition of subsection (e) and paragraph (h)(9).

References to "filing" an application, in §§92.14, 92.15, 92.17, and 92.18, were changed to "submitting" an application, which clarifies and improves the accuracy of the section.

Section 92.14(f) was amended to clarify that the referenced Subchapter D relates to facility construction.

Section 92.15 had several minor editorial changes made that clarify and improve the accuracy of the section.

Section 92.15(d)(3) was amended to allow a license holder to submit an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information during the 45-day period ending on the date the current license expires. This provision is consistent with other licensing rules of DADS.

Section 92.551(g)(1) was changed to add "and" to clarify and improve the accuracy of the section.

DADS received written comments from the Texas Association of Residential Care Communities, Texas Association for Home Care, and from two individuals. A summary of the comments and the responses follow.

Comment: Regarding the new definition of "bedfast" in §92.2(8), a commenter suggested deleting the word "permanently" from the new definition because it did not reflect actual circumstances.

Response: The agency has deleted the new definition of "bedfast" proposed in §92.2(8). The agency will solicit input from stakeholders regarding use of the term "bedfast" in current §92.4(2)(D) and in new §92.3(c) to assess the need for a definition.

Comment: Regarding the definition of "immediately available" in §92.2(23), two individuals suggested the addition of language to clarify staff that must be in the building while on duty.

Response: The agency amended the definition of "immediately available" in §92.2(23) by adding the phrase "and in the facility while on duty" to the end of the current definition to provide further clarification that is consistent with §92.41(a)(2)(A).

Comment: Regarding the definition "management services" in §92.2(26), a commenter suggested adding "transportation" to the list of sole contracts that are not considered management services.

Response: The agency agreed with the suggestion and changed the definition of "management services" to exclude transportation.

Comment: A commenter asked if the agency plans to update the "NPFA 101" definition in §92.2(32) to reference the 2000 edition of the LSC.

Response: The 1988 publication is the version currently in use by DADS. The agency did not change the rule in response to this comment.

Comment: Regarding the new definition of "outside resource" in §92.2(35), a commenter suggested clarifying who a resident has the right to contract with for health care services by changing the phrase "health care professional" to "health care entity or professional."

Response: The agency deleted the definition of "outside resource" in §92.2(35), and its use of the term in §92.5(b), and amended §92.5(b) to use the language in Health and Safety Code §247.067 to more clearly implement the statute, which states who a resident has the right to contract with for health care services and clearly defines a "health care professional."

Comment: Regarding the definition for "physician" in §92.2(37), a commenter stated the definition was too prescriptive and limit-

ing and suggested broadening the definition to include the same body of physicians permitted in the home and community support services agency (HCSSA) rule language.

Response: The HCSSA definition for physician found in Chapter 90, which includes physicians from contiguous states that border Texas, reflects a unique situation that is limited to home health or hospice services delivered by a home and community support services agency licensed in the state of Texas, and is authorized by the Texas Occupations Code, §151.056(b)(4) and the Texas Medical Board's rule, Title 22, §172.12(f)(g). The agency did not make the suggested change.

Comment: Regarding the definition "working day" in §92.2(53), a commenter suggested using the term "business day" instead.

Response: The term "working day" is used in Health and Safety Code Chapter 247 governing assisted living facilities. The agency feels the use of the term "working day" in §92.2(53) meets the intent of the statute. The agency did not change the proposed rule in response to this comment.

Comment: A commenter suggested deleting the words "health" and "staff" used in §92.11(c)(1)(B) because the terms are unnecessary.

Response: Section 92.11(c)(1)(B) applies to an initial application. The agency retained the word "health" in §92.11(c)(1)(B) to distinguish the visit required in §92.11(c)(1)(B), for the purpose of observing resident care, from the initial LSC visit required in §92.11(c)(1)(A)(iii) for the purpose of ensuring the building is safe to occupy. However, the agency amended §92.11(c)(1)(A)(iii), to provide clarification about the LSC visit and also deleted the word "staff" in §92.11(c)(1)(B).

Comment: A commenter suggested revising the rule language in §92.11(c)(2) so that it does not offer the presumption that all facilities are accredited.

Response: The "or" at the end of §92.11(c)(1)(B) provides the applicant the option to affirmatively show that the facility meets §92.11(c)(1), the DADS licensing standards, or §92.11(c)(2), the standards for accreditation. The agency did not make the suggested change.

Comment: A commenter suggested revising §92.11(h)(7)(A) and §92.11 (h)(7)(E) to capture the history of the applicant "in any state."

Response: The history of the applicant in any state is addressed in §92.11(h)(7). The agency did not change the rule in response to this comment.

Comment: A commenter suggested adding language to §92.12(c) to emphasize the need for the application to include written approval from the local fire authority.

Response: The agency feels the rule language in proposed §92.12(c) sufficiently conveys the requirement. The agency did not change the rule in response to this comment.

Comment: A commenter suggested shortening the timeframe in §92.13(b), which states the agency denies an application that remains incomplete 120 days after the date that the DADS Licensing and Credentialing Section receives the application.

Response: The agency declined to shorten the timeframe at this time, but may consider making the change in the future. The agency did not change the rule in response to this comment.

Comment: A commenter suggested adding language to §92.14(d) to emphasize the agency will not conduct an on-site LSC inspection until the applicant has satisfied the application filing requirements, which includes submitting written approval from the local fire authority.

Response: The agency feels the rule language in §92.14(d) sufficiently conveys that the LSC inspection occurs after an applicant has met the requirements of §92.11 and §92.12. The agency did not change the rule in response to this comment.

Comment: A commenter suggested adding language to §92.14(f) to clarify the number of residents that can be admitted to a facility for a health inspection after a facility has met the licensure requirements in Subchapter D.

Response: The agency feels the rule language in proposed §92.14(f) sufficiently conveys the requirement. However, the agency amended §92.14(f) to clarify that Subchapter D relates to Facility Construction requirements.

Comment: Regarding §92.14(e), a commenter requested flexibility in the rule language and suggested substituting the word "denies" with the words "may deny."

Response: A current rule at §92.10(c) states that "an application which remains incomplete after 120 days will be denied." The language in §92.14(e) adopts current practice as rule and clarifies that "if the facility fails to meet the LSC requirements within 120 days after the LSC inspection, DADS denies the application for an increase in capacity." The agency did not make the suggested change.

Comment: A commenter suggested substituting "one year" for "12 months" and "24 months" for "two years" in §92.15(a)(1) and (b)(1) and (2).

Response: The agency has determined that the language used in §92.15(a)(1) and §92.15(b)(1) and (2) sufficiently conveys the intended meaning. The agency did not change the rule in response to this comment.

Comment: A commenter suggested deleting the word "health" used in §92.16(f), stating the term was inappropriate as used.

Response: The rule language proposed in §92.16(f) applies to a change of ownership application. DADS retained the word "health" in §92.16(f) to distinguish between the on-site visit required for the purpose of observing resident care from the LSC visit that DADS may also conduct if the facility is out of compliance with the Life Safety Code licensure requirements in Subchapter D (relating to Facility Construction). However, the agency amended §92.16(f) to provide clarification about the LSC visit.

Comment: A commenter stated that the rule language in §92.18(e) was unnecessarily restrictive and suggested substituting the word "denies" with the words "may deny."

Response: Current requirements in §92.10(c) indicate that "an application which remains incomplete after 120 days will be denied." The language in §92.18(e) adopts current practice as rule and clarifies that "if the facility fails to meet the LSC requirements within 120 days after the LSC inspection, DADS denies the application for an increase in capacity." DADS did not change the rule in response to this comment.

SUBCHAPTER A. INTRODUCTION

40 TAC §§92.1 - 92.6

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

§92.1. Purpose and Application.

(a) The purpose of this chapter is to establish:

(1) the criteria and application procedure for licensing an assisted living facility;

(2) the licensing standards with which an assisted living facility must comply and that serve as a basis for licensure inspections, including:

(A) operation and resident care standards; and

(B) facility construction standards;

(3) the inspections and investigations DADS may conduct as a regulatory authority; and

(4) enforcement actions DADS may take against an assisted living facility.

(b) This chapter applies to an assisted living facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 247. Assisted living services are driven by a philosophy that emphasizes personal dignity and autonomy to age in place in a residential setting while receiving increasing or decreasing levels of services as the person's needs change.

§92.2. Definitions.

The following words and terms, when used in this chapter, have the following meaning, unless the context clearly indicates otherwise.

(1) Accreditation commission--Has the meaning given in Texas Health and Safety Code, §247.032.

(2) Advance directive--Has the meaning given in Texas Health and Safety Code, §166.002.

(3) Affiliate--With respect to:

(A) a partnership, each partner thereof;

(B) a corporation, each officer, director, principal stockholder, subsidiary, and each person with a disclosable interest, as the term is defined in this section; and

(C) a natural person:

(i) said person's spouse;

(ii) each partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) each corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(4) Alzheimer's facility--A type B assisted living facility that is certified to provide specialized services to residents with Alzheimer's or a related condition.

(5) Applicant--A person applying for a license to operate an assisted living facility under Texas Health and Safety Code, Chapter 247.

(6) Attendant--A facility employee who provides direct care to residents. This employee may serve other functions, including cook, janitor, porter, maid, laundry worker, security personnel, bookkeeper, activity director, and manager.

(7) Authorized electronic monitoring (AEM)--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(8) Behavioral emergency--Has the meaning given in §92.41(p)(2) of this chapter (relating to Standards for Type A, Type B, and Type E Assisted Living Facilities).

(9) Change of ownership--A change of ownership is:

(A) a change of sole proprietorship that is licensed to operate a facility;

(B) a change of 50 percent or more in the ownership of the business organization that is licensed to operate the facility;

(C) a change in the federal taxpayer identification number; or

(D) relinquishment by the license holder of the operation of the facility.

(10) Co-mingles--The laundering of apparel or linens of two or more individuals together.

(11) Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an assisted living facility or other person. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of an assisted living facility;

(B) any person who is a controlling person of a management company or other business entity that operates an assisted living facility or that contracts with another person for the operation of an assisted living facility; and

(C) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of an assisted living facility, is in a position of actual control or authority with respect to the facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility, except an employee, lender, secured creditor, landlord, or other person who does not exercise formal or actual influence or control over the operation of an assisted living facility.

(12) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and DADS have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(13) DADS--The Department of Aging and Disability Services.

(14) DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to DADS.

(15) Dietitian--A person who currently holds a license or provisional license issued by the Texas State Board of Examiners of Dietitians.

(16) Disclosure statement--A DADS form for prospective residents or their legally authorized representatives that a facility must complete. The form contains information regarding the preadmission, admission, and discharge process; resident assessment and service plans; staffing patterns; the physical environment of the facility; resident activities; and facility services.

(17) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(18) Facility--An entity required to be licensed under the Assisted Living Facility Licensing Act, Texas Health and Safety Code, Chapter 247.

(19) Fire suppression authority--The paid or volunteer firefighting organization or tactical unit that is responsible for fire suppression operations and related duties once a fire incident occurs within its jurisdiction.

(20) Governmental unit--The state or any county, municipality, or other political subdivision, or any department, division, board, or other agency of any of the foregoing.

(21) Health care professional--An individual licensed, certified, or otherwise authorized to administer health care, for profit or otherwise, in the ordinary course of business or professional practice. The term includes a physician, registered nurse, licensed vocational nurse, licensed dietitian, physical therapist, and occupational therapist.

(22) Immediate threat--There is considered to be an immediate threat to the health or safety of a resident, or a situation is considered to put the health or safety of a resident in immediate jeopardy, if there is a situation in which an assisted living facility's noncompliance with one or more requirements of licensure has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

(23) Immediately available--The capacity of facility staff to immediately respond to an emergency after being notified through a communication or alarm system. The staff are to be no more than 600 feet from the farthest resident and in the facility while on duty.

(24) Large facility--A facility licensed for 17 or more residents.

(25) Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(26) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, transportation, or food services.

(27) Manager--The individual in charge of the day-to-day operation of the facility.

(28) Medication--

(A) Medication is any substance:

(i) recognized as a drug in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, Texas Drug Code Index or official National Formulary, or any supplement to any of these official documents;

(ii) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease;

(iii) other than food intended to affect the structure or any function of the body; and

(iv) intended for use as a component of any substance specified in this definition.

(B) Medication includes both prescription and over-the-counter medication, unless otherwise specified.

(C) Medication does not include devices or their components, parts, or accessories.

(29) Medication administration--The direct application of a medication or drug to the body of a resident by an individual legally allowed to administer medication in the state of Texas.

(30) Medication assistance or supervision--The assistance or supervision of the medication regimen by facility staff. Refer to §92.41(j) of this chapter.

(31) Medication (self-administration)--The capability of a resident to administer the resident's own medication or treatments without assistance from the facility staff.

(32) NFPA 101--The 1988 publication titled "NFPA 101 Life Safety Code" published by the National Fire Protection Association, Inc., 1 Batterymarch Park, Quincy, Massachusetts 02169.

(33) Ombudsman--has the meaning given in §85.2 of this title (relating to Definitions).

(34) Person--Any individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(35) Person with a disclosable interest--Any person who owns 5.0 percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Health and Safety Code, Chapter 247. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company unless such entity participates in the management of the facility.

(36) Personal care services--Assistance with meals, dressing, movement, bathing, or other personal needs or maintenance; the administration of medication by a person licensed to administer medications or the assistance with or supervision of medication; or general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in the facility or who needs assistance to manage his or her personal life, regardless of whether a guardian has been appointed for the person.

(37) Physician--A practitioner licensed by the Texas Medical Board.

(38) Practitioner--An individual who is currently licensed in a state in which the individual practices as a physician, dentist, podiatrist, or a physician assistant; or a registered nurse approved by the Texas Board of Nursing to practice as an advanced practice nurse.

(39) Qualified medical personnel--An individual who is licensed, certified, or otherwise authorized to administer health care.

The term includes a physician, registered nurse, and licensed vocational nurse.

(40) Resident--An individual accepted for care in a facility.

(41) Respite--The provision by a facility of room, board, and care at the level ordinarily provided for permanent residents of the facility to a person for not more than 60 days for each stay in the facility.

(42) Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(43) Restraints--Chemical restraints are psychoactive drugs administered for the purposes of discipline or convenience and are not required to treat the resident's medical symptoms. Physical restraints are any manual method, or physical or mechanical device, material, or equipment attached or adjacent to the resident that restricts freedom of movement. Physical restraints include restraint holds.

(44) Safety--Protection from injury or loss of life due to such conditions as fire, electrical hazard, unsafe building or site conditions, and the hazardous presence of toxic fumes and materials.

(45) Seclusion--The involuntary separation of a resident from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(46) Service plan--A written description of the medical care, supervision, or nonmedical care needed by a resident.

(47) Short-term acute episode--An illness of less than 30 days duration.

(48) Small facility--A facility licensed for 16 or fewer residents.

(49) Staff--Employees of an assisted living facility.

(50) Standards--The minimum conditions, requirements, and criteria established in this chapter with which a facility must comply to be licensed under this chapter.

(51) Terminal condition--A medical diagnosis, certified by a physician, of an illness that will result in death in six months or less.

(52) Universal precautions--An approach to infection control in which blood, any body fluids visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids are treated as if known to be infectious for HIV, hepatitis B, and other blood-borne pathogens.

(53) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

§92.3. Types of Assisted Living Facilities.

(a) Basis for licensure type. An assisted living facility must be licensed as a Type A, Type B, Type C, or Type E facility. A facility's licensure type is based on the capability of the residents to evacuate the facility or the types of services the facility provides, or both, as described in this section.

(b) Type A. In a Type A facility, a resident:

(1) must be physically and mentally capable of evacuating the facility without physical assistance from staff, which may include an individual who is mobile, although non-ambulatory, such as an individual who uses a wheelchair or an electric cart, and has the capacity to transfer and evacuate himself or herself in an emergency;

(2) does not require routine attendance during nighttime sleeping hours; and

(3) must be capable of following directions under emergency conditions.

(4) must be able to demonstrate to DADS that they can meet the evacuation requirements described in §92.62(b) of this chapter.

(c) Type B. In a Type B facility, a resident may:

(1) require staff assistance to evacuate;

(2) require attendance during nighttime sleeping hours;

(3) be incapable of following directions under emergency conditions; and

(4) require assistance in transferring to and from a wheelchair, but must not be permanently bedfast.

(d) Type C. A Type C facility is a four-bed facility that:

(1) has an active contract with DADS to provide adult foster care services as described in Chapter 48, Subchapter K of this title (relating to Minimum Standards for Adult Foster Care); and

(2) must be contracted with DADS to provide adult foster care services before it can be licensed.

(e) Type E.

(1) In a Type E facility, a resident:

(A) must be physically and mentally capable of evacuating the facility without physical assistance from staff, which may include an individual who is mobile, although non-ambulatory, such as an individual who uses a wheelchair or an electric cart and has the capacity to transfer and evacuate himself or herself in an emergency;

(B) must not require routine attendance during nighttime sleeping hours;

(C) must be capable of following directions under emergency conditions; and

(D) must be able to demonstrate to DADS that they can meet the evacuation requirements described in §92.72(b) of this chapter.

(2) Notwithstanding any other provision in this chapter, a Type E facility:

(A) provides only:

(i) medication supervision, in accordance with Texas Health and Safety Code, §247.002(5)(B); and

(ii) general supervision of residents' welfare, in accordance with Texas Health and Safety Code §247.002(5)(C); and

(B) must not provide substantial assistance with the activities of daily living, as described by Texas Health and Safety Code §247.002(5)(A) (assistance with meals, dressing, movement, bathing, or other personal needs or maintenance).

§92.5. Health Care Professional.

(a) A health care professional, may provide services to a resident within the professional's scope of practice; however, the facility

must not provide ongoing services to a resident that are comparable to the services available in a nursing facility licensed under Texas Health and Safety Code, Chapter 242.

(b) A resident may contract with a home and community support services agency licensed under Chapter 142 or with an independent health professional to have health care services delivered to the resident at the facility.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 23, 2008.

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Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §§92.11 - 92.20, 92.54

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

§92.11. Criteria for Licensing.

(a) A person must be licensed to establish or operate an assisted living facility in Texas.

(1) An assisted living facility is an establishment that:

(A) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and

(B) provides personal care services.

(2) DADS considers one or more facilities to be part of the same establishment and, therefore, subject to licensure as an assisted living facility, based on the following factors:

(A) common ownership;

(B) physical proximity;

(C) shared services, personnel, or equipment in any part of the facilities' operations; and

(D) any public appearance of joint operations or of a relationship between the facilities.

(3) The presence or absence of any one factor in paragraph (2) of this subsection is not conclusive.

(b) To obtain a license, a person must follow the application requirements in this subchapter and meet the criteria for a license.

(c) An applicant must affirmatively show that the applicant, license holder, controlling person, and any person required to submit background and qualification information meet the criteria and eligibility for licensing, in accordance with this section, and:

(1) affirmatively show that:

(A) the building in which the facility is housed:

(i) meets local fire ordinances;

(ii) is approved by the local fire authority; and

(iii) meets DADS licensing standards in accordance with Subchapter D of this chapter (relating to Facility Construction) based on an onsite inspection by DADS; and

(B) operation of the facility meets DADS licensing standards based on an on-site health inspection by DADS, which must include observation of the care of a resident; or

(2) affirmatively show that the facility meets the standards for accreditation based on an on-site accreditation survey by the accreditation commission.

(d) An applicant that chooses the option allowed in subsection (c)(2) of this section must contact DADS to determine which accreditation commissions are available to meet the requirements of subsection (c)(2) of this section.

(e) DADS issues a license to a facility meeting all requirements of this chapter. The facility must not exceed the maximum allowable number of residents specified on the license.

(f) DADS denies an application for an initial license or for the renewal of a license if:

(1) the applicant, license holder, controlling person, or any person required to submit background and qualification information has been debarred or excluded from the Medicare or Medicaid programs by the federal government or a state;

(2) a court has issued an injunction prohibiting the applicant, license holder, controlling person, or any person required to submit background and qualification information from operating a facility; or

(3) during the five years preceding the date of the application, a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state held by the applicant, license holder, controlling person, or any person required to submit background and qualification information has been revoked.

(g) A license holder or controlling person who operates a nursing facility or an assisted living facility for which a trustee was appointed and for which emergency assistance funds, other than funds to pay the expenses of the trustee, were used is subject to exclusion from eligibility for:

(1) the issuance of an initial license for a facility for which the person has not previously held a license; and

(2) the renewal of the license of the facility for which the trustee was appointed.

(h) DADS may deny an application for an initial license or refuse to renew a license if an applicant, license holder, controlling

person, or any person required to submit background and qualification information:

(1) violates Texas Health and Safety Code, Chapter 247; a section, standard or order adopted under Chapter 247; or a license issued under Chapter 247 in either a repeated or substantial manner;

(2) commits an act described in §92.551(a)(2) - (7) of this chapter (relating to Administrative Penalties);

(3) aids, abets, or permits a substantial violation described in paragraphs (2) - (3) of this subsection about which the person had or should have had knowledge;

(4) fails to provide the required information, facts, or references;

(5) provides the following false or fraudulent information:

(A) knowingly submits false or intentionally misleading statements to DADS;

(B) uses subterfuge or other evasive means of filing an application for licensure;

(C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;

(D) knowingly conceals a material fact related to licensure; or

(E) is responsible for fraud;

(6) fails to pay the following fees, taxes, and assessments when due:

(A) license fees as described in §92.4 of this chapter (relating to License Fees); or

(B) franchise taxes, if applicable;

(7) during the five years preceding the date of the application, has a history in any state or other jurisdiction of any of the following:

(A) operation of a facility that has been decertified or has had its contract canceled under the Medicare or Medicaid program;

(B) federal or state long-term care facility, assisted living facility, or similar facility sanctions or penalties, including monetary penalties, involuntary downgrading of the status of a facility license, proposals to decertify, directed plans of correction, or the denial of payment for new Medicaid admissions;

(C) unsatisfied final judgments, excluding judgments wholly unrelated to the provision of care rendered in long-term care facilities;

(D) eviction involving any property or space used as a facility; or

(E) suspension of a license to operate a health care facility, long-term care facility, assisted living facility, or a similar facility;

(8) violates Texas Health and Safety Code, §247.021 by operating a facility without a license; or

(9) has a state or federal criminal conviction for any offense that provides a penalty of incarceration.

(i) For the grounds for denial of an application for an initial license or an application for renewal of a license set out in subsection (h)(8) of this section, DADS considers exculpatory information provided by an applicant, a license holder, a person with a disclosable interest, or a manager and may grant a license if DADS finds the applicant, license holder, person with a disclosable interest, affiliate, or manager able to comply with the rules in this chapter.

(j) For the grounds for denial of an application for an initial license or an application for renewal of a license set out in subsections (f) and (h)(8) of this section, DADS considers only final actions. An action is final when routine administrative and judicial remedies are exhausted. An applicant must disclose all actions, whether pending or final.

(k) If an applicant owns multiple facilities, DADS examines the overall record of compliance in all of the applicant's facilities. An overall record poor enough to deny issuance of a new license does not preclude the renewal of a license of a facility with a satisfactory record.

§92.14. Initial License Application Procedures and Requirements.

(a) An applicant must complete the DADS pre-licensure training course before submitting an application for an initial license. An applicant that is currently licensed under Texas Health and Safety Code, Chapter 247 is exempt from this requirement.

(b) An applicant for an initial license must submit an application in accordance with §92.12 of this subchapter (relating to General Application Requirements) and include the fees required in §92.4 of this chapter (relating to License Fees).

(c) DADS reviews an application for an initial license within 30 days after the date DADS' Licensing and Credentialing Section receives the application and notifies the applicant if additional information is needed to complete the application.

(d) The applicant must send written notice to DADS indicating that the facility is ready for a Life Safety Code (LSC) inspection. The written notice must be submitted with the application or within 120 days after DADS' Licensing and Credentialing Section receives the application. After DADS has received the written notice and the applicant has satisfied the application submission requirements in §92.11 of this subchapter (relating to Criteria for Licensing) and §92.12 of this subchapter, DADS staff conduct an on-site LSC inspection of the facility to determine if the facility meets the licensure requirements in Subchapter D of this chapter (relating to Facility Construction).

(e) If the facility fails to meet the licensure requirements within 120 days after the initial LSC inspection, DADS denies the application for a license.

(f) After a facility has met the licensure requirements in Subchapter D of this chapter (relating to Facility Construction) and has admitted at least one but no more than three residents, the applicant must send a written notice to DADS indicating the facility is ready for a health inspection.

(1) DADS staff conduct an on-site health inspection to determine if the facility meets the licensure requirements for standards of operation and resident care in Subchapter C of this chapter (relating to Standards for Licensure).

(2) If the facility fails to meet the licensure requirements for standards of operation and resident care within 120 days after the initial health inspection, DADS denies the application for a license.

(g) DADS issues a license within 30 days after DADS determines that the applicant and the facility have met the licensure requirements of this section. The issuance of a license constitutes DADS' official written notice to the facility of the approval of the application.

(h) DADS may deny an application for an initial license if the applicant, controlling person, or any person required to submit background and qualification information fails to meet the criteria for a license established in §92.11 of this subchapter.

(i) If DADS denies an application for an initial license, DADS sends the applicant a written notice of the denial and informs the applicant of the applicant's right to request an administrative hearing to appeal the denial. The administrative hearing is held in accordance with Texas Health and Human Services Commission rules at 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

§92.15. Renewal Procedures and Qualifications.

(a) A license issued under this chapter:

(1) expires two years after the date issued, except as provided by subsection (b) of this section;

(2) must be renewed before the license expiration date; and

(3) is not automatically renewed.

(b) A facility must submit an application for license renewal and a renewal license will be valid as follows:

(1) For two years beginning September 1, 2008, a facility with a facility identification number that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's first renewal license issued beginning September 1, 2008, is valid for one year, and subsequent renewal licenses are valid for two years.

(2) A facility with a facility identification number that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's renewal licenses are valid for two years.

(c) An application for renewal must comply with the requirements of §92.12 of this subchapter (relating to General Application Requirements) and §92.13 of this subchapter (relating to Time Periods for Processing All Types of License Applications). The submission of a license fee alone does not constitute an application for renewal.

(d) To renew a license, a license holder must submit an application for renewal with DADS before the expiration date. DADS considers the license holder has met the renewal application submission deadline if the license holder submits to DADS:

(1) a complete application for renewal no later than 45 days before the expiration of the current license;

(2) an incomplete application for renewal, with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS receives the incomplete application and the letter no later than 45 days before the expiration of the current license; or

(3) a complete application or an incomplete application with a letter explaining the circumstances which prevented the inclusion of the missing information to DADS, and DADS receives the application during the 45-day period ending on the date the current license expires, and the license holder pays the late fee established in §92.4(b) of this chapter (relating to License Fees) in addition to the basic renewal fee.

(e) If the application is postmarked on or before the submission deadline, the application is considered to be timely if it is received in DADS' Licensing and Credentialing Section, Regulatory Services Division, within 15 days after the date of the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of DADS that the delay was due to the shipper. It is the license holder's responsibility to ensure that the application is timely received by DADS.

(f) For purposes of Texas Government Code, §2001.054, DADS considers that an individual has submitted a timely and sufficient application for the renewal of a license if the license holder's application has met the submission deadlines in subsections (d) and (e) of this section. Failure to submit a timely and sufficient application will result in the expiration of the license.

(g) An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §92.14 of this subchapter (relating to Initial License Application Procedures and Requirements).

(h) DADS reviews an application for a renewal license within 30 days after the date DADS' Licensing and Credentialing Section receives the application and notifies the applicant if additional information is needed to complete the application.

(i) A license holder applying for a license renewal must affirmatively show that the facility meets DADS licensing standards based on an on-site inspection by DADS, which must include an observation of the care of a resident.

(j) If an applicant is relying on §92.11(c)(2) of this subchapter (relating to Criteria for Licensing) to comply with the requirements for licensure, the application for the renewal of a license must include a copy of the license holder's required accreditation report from the accreditation commission.

(k) DADS may pend action on an application for the renewal of a license for up to six months if the facility has not met licensure requirements during an on-site inspection.

(l) The issuance of a license constitutes DADS' official written notice to the facility of the approval of the application.

(m) DADS may deny an application for the renewal of a license if the applicant, controlling person, or any person required to submit background and qualification information fails to meet the criteria for a license established in §92.11 of this subchapter.

(n) Before denying an application for renewal of a license, DADS gives the license holder:

(1) notice by personal service or by registered or certified mail of the facts or conduct alleged to warrant the proposed action; and

(2) an opportunity to show compliance with all requirements of law for the retention of the license.

(o) To request an opportunity to show compliance, the license holder must send its written request to the director of the Enforcement Section, Regulatory Services Division. The request must:

(1) be postmarked within 10 days after the date of DADS' notice and be received in the office of the director of the Enforcement Section, Regulatory Services Division, within 10 days after the date of the postmark; and

(2) contain specific documentation refuting DADS' allegations.

(p) The opportunity to show compliance is limited to a review of documentation submitted by the license holder and information DADS used as the basis for its proposed action and is not conducted as an adversary hearing. DADS gives the license holder a written affirmation or reversal of the proposed action.

(q) If DADS denies an application for the renewal of a license, the applicant may request:

(1) an informal reconsideration by the Health and Human Services Commission; and

(2) an administrative hearing to appeal the denial.

§92.16. Change of Ownership.

(a) A license is not transferable as part of a change of ownership as defined in §92.2 of this chapter (relating to Definitions).

(b) At least 30 days before the anticipated date of the change of ownership, the prospective owner must notify DADS of the change of ownership by submitting an application for an initial license based on a change of ownership under §92.14 of this subchapter (relating to Initial Application Procedures and Requirements) and the fee required in §92.4 of this chapter (relating to License Fees).

(c) To avoid a facility operating while unlicensed, an applicant must submit an application for an initial license based on a change of ownership at least 30 days before the anticipated date of the sale or other transfer to the new owner. The effective date of the change of ownership cannot precede the date the application is received by DADS' Licensing and Credentialing Section, Regulatory Services Division.

(d) DADS may assess an administrative penalty in accordance with Subchapter H, Division 9 of this chapter (relating to Administrative Penalties) against a person who fails to notify DADS before the effective date of the change of ownership.

(e) Pending DADS' review of the application for an initial license based on a change of ownership, the current license holder must continue to meet all requirements for operation of the facility.

(f) After reviewing the application for an initial license based on a change of ownership, DADS conducts an on-site health inspection to determine if the facility meets the standards for operation and resident care. If the facility is out of compliance with Life Safety Code licensure requirements in Subchapter D of this chapter (relating to Facility Construction), DADS also conducts an on-site Life Safety Code inspection of the facility.

(g) DADS issues the license within 30 days after DADS determines that the applicant and the facility have met the licensure requirements of this section. The issuance of a license constitutes DADS' official written notice to the facility of the approval of the application for a change of ownership.

(h) DADS may deny an application for a change of ownership if the applicant, controlling person, or any person required to submit background and qualification information fails to meet the criteria for a license established in §92.11 of this subchapter (relating to Criteria for Licensing).

(i) If DADS denies an application for an initial license based on a change of ownership, DADS sends the applicant a written notice of the denial and informs the applicant of the applicant's right to request an administrative hearing to appeal the denial. The administrative hearing is held in accordance with Texas Health and Human Services Commission rules at 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

§92.17. Relocation.

(a) Relocation is the closing of a facility and the movement of its residents to another location.

(b) A license holder must not relocate a facility without approval from DADS.

(c) Before a relocation, the license holder must submit an application for an initial license for the new location in accordance with §92.14 of this subchapter (relating to Initial Application Procedures and Requirements) and the fee required in §92.4 of this chapter (relating to License Fees).

(d) Residents must not be relocated until the new building has been inspected and approved as meeting the Life Safety Code licensure requirements in Subchapter D of this chapter (relating to Facility Construction).

(e) Following Life Safety Code approval by DADS, the license holder must notify DADS of the date the residents will be relocated.

(f) DADS issues a license for the new facility if the new facility meets the standards of operation and resident care based on an on-site health inspection. The effective date of the license is the date all residents are relocated.

(g) The license holder must continue to maintain the license at the current location and must continue to meet all requirements for operation of the facility until DADS has approved the relocation. The issuance of a license constitutes DADS' approval of the relocation. The license for the current location becomes invalid upon issuance of the new license for the new location.

§92.18. Increase in Capacity.

(a) A license holder must not increase a facility's licensed capacity without approval from DADS.

(b) The license holder must submit an application for an increase in capacity in accordance with §92.12 (relating to General Application Requirements) and the fee required in §92.4 of this chapter (relating to License Fees).

(c) The license holder must arrange for an inspection of the facility by the local fire marshal and provide the signed fire marshal approval to DADS.

(d) After DADS' review of an application and after the applicant notifies DADS in writing that the facility is ready for a Life Safety Code (LSC) inspection, DADS staff conduct an on-site LSC inspection of the facility to determine if the facility meets the LSC licensure requirements in Subchapter D of this chapter (relating to Facility Construction).

(e) If the facility fails to meet the LSC licensure requirements within 120 days after the LSC inspection, DADS denies the application for an increase in capacity.

(f) After a facility has met LSC licensure requirements, DADS staff conduct an on-site health inspection to determine if the facility meets the licensure requirements for standards of operation and resident care in Subchapter C of this chapter (relating to Standards for Licensure).

(g) DADS issues a new license with an increased capacity within 30 days after DADS determines that all licensure requirements have been met. DADS may grant approval to occupy the increased capacity once DADS determines that all licensure requirements have been met.

(h) In order to meet the residents' health and safety needs in the event of a fire, natural disaster, or catastrophic event, DADS may grant approval to temporarily exceed a facility's licensed capacity provided the health and safety of residents are not compromised and the facility can meet the required health care service needs of all residents. A facility may exceed its licensed capacity under this circumstance, monitored by DADS, until residents can be transferred to a permanent location. DADS will issue authorization for the temporary increase in the facility's licensed capacity. The authorization to temporarily increase the capacity ends when the facility receives written notice from DADS ending the authorization.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. ENFORCEMENT
DIVISION 9. ADMINISTRATIVE PENALTIES

40 TAC §92.551

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

§92.551. Administrative Penalties.

(a) Assessment of an administrative penalty. DADS may assess an administrative penalty if a license holder:

(1) violates:

(A) Texas Health and Safety Code, Chapter 247;

(B) a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or

(C) a term of a license issued under Texas Health and Safety Code, Chapter 247;

(2) makes a false statement of material fact that the license holder knows or should know is false:

(A) on an application for issuance or renewal of a license;

(B) in an attachment to the application; or

(C) with respect to a matter under investigation by DADS;

(3) refuses to allow a DADS representative to inspect:

(A) a book, record, or file that a facility must maintain; or

(B) any portion of the premises of a facility;

(4) willfully interferes with the work of a DADS representative or the enforcement of this chapter;

(5) willfully interferes with a DADS representative preserving evidence of a violation of Texas Health and Safety Code, Chapter 247; a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or a term of a license issued under Texas Health and Safety Code, Chapter 247;

(6) fails to pay an administrative penalty not later than the 30th calendar day after the penalty assessment becomes final; or

(7) fails to notify DADS of a change of ownership before the effective date of the change of ownership.

(b) Criteria for assessing an administrative penalty. DADS considers the following in determining the amount of an administrative penalty:

(1) the gradations of penalties established in subsection (d) of this section;

(2) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the situation, and the hazard or potential hazard created by the situation to the health or safety of the public;

(3) the history of previous violations;

(4) deterrence of future violations;

(5) the license holder's efforts to correct the violation;

(6) the size of the facility and of the business entity that owns the facility; and

(7) any other matter that justice may require.

(c) Late payment of an administrative penalty. A license holder must pay an administrative penalty within 30 calendar days after the penalty assessment becomes final. If a license holder fails to timely pay the administrative penalty, DADS may assess an administrative penalty under subsection (a)(6) of this section, which is in addition to the penalty that was previously assessed and not timely paid.

(d) Administrative penalty schedule. DADS uses the schedule of appropriate and graduated administrative penalties in this subsection to determine which violations warrant an administrative penalty.
Figure: 40 TAC §92.551(d)

(e) Administrative penalty assessed against a resident. DADS does not assess an administrative penalty against a resident, unless the resident is also an employee of the facility or a controlling person.

(f) Proposal of administrative penalties.

(1) DADS issues a preliminary report stating the facts on which DADS concludes that a violation has occurred after DADS has:

(A) examined the possible violation and facts surrounding the possible violation; and

(B) concluded that a violation has occurred.

(2) DADS may recommend in the preliminary report the assessment of an administrative penalty for each violation and the amount of the administrative penalty.

(3) DADS provides a written notice of the preliminary report to the license holder not later than 10 calendar days after the date on which the preliminary report is issued. The written notice includes:

(A) a brief summary of the violation;

(B) the amount of the recommended administrative penalty;

(C) a statement of whether the violation is subject to correction in accordance with subsection (g) of this section and, if the violation is subject to correction, a statement of:

(i) the date on which the license holder must file with DADS a plan of correction for approval by DADS; and

(ii) the date on which the license holder must complete the plan of correction to avoid assessment of the administrative penalty; and

(D) a statement that the license holder has a right to an administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(4) Not later than 20 calendar days after the date on which a license holder receives a written notice of the preliminary report, the license holder may:

(A) give DADS written consent to the preliminary report, including the recommended administrative penalty; or

(B) make a written request to the Texas Health and Human Services Commission (HHSC) for an administrative hearing.

(5) If a violation is subject to correction under subsection (g) of this section, the license holder must submit a plan of correction to DADS for approval not later than 10 calendar days after the date on which the license holder receives the written notice described in paragraph (3) of this subsection.

(6) If a violation is subject to correction under subsection (g) of this section, and after the license holder reports to DADS that the violation has been corrected, DADS inspects the correction or takes any other step necessary to confirm the correction and notifies the facility that:

(A) the correction is satisfactory and DADS will not assess an administrative penalty; or

(B) the correction is not satisfactory and a penalty is recommended.

(7) Not later than 20 calendar days after the date on which a license holder receives a notice under paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty), the license holder may:

(A) give DADS written consent to DADS' report, including the recommended administrative penalty; or

(B) make a written request to HHSC for an administrative hearing.

(8) If a license holder consents to the recommended administrative penalty or does not timely respond to a notice sent under paragraph (3) of this subsection (written notice of the preliminary report) or paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty):

(A) the commissioner or the commissioner's designee assesses the recommended administrative penalty;

(B) DADS gives written notice of the decision to the license holder; and

(C) the license holder must pay the penalty not later than 30 calendar days after the written notice given in subparagraph (B) of this paragraph.

(g) Opportunity to correct.

(1) A license holder has an opportunity to correct a violation, except a violation described in paragraph (2) of this subsection, and to avoid paying an administrative penalty, if the license holder corrects the violation not later than 45 calendar days after the date the facility receives the written notice described in subsection (f)(3) of this section.

(2) A license holder does not have an opportunity to correct a violation:

(A) that DADS determines results in serious harm to or death of a resident;

(B) described by subsection (a)(2) - (7) of this section;

(C) related to advance directives as described in §92.41(g);

(D) that is the second or subsequent violation of:

(i) a right of the same resident under §92.125 of this chapter (relating to Advance Directives); or

(ii) the same right of all residents under §92.125 of this chapter; or

(E) a violation that is written because of an inappropriately placed resident, except as described in §92.41(f) of this chapter (relating to Inappropriate Placement).

(3) Maintenance of violation correction.

(A) A license holder that corrects a violation must maintain the correction. If the license holder fails to maintain the correction until at least the first anniversary of the date the correction was made, DADS may assess and collect an administrative penalty for the subsequent violation.

(B) An administrative penalty assessed under this paragraph is equal to three times the amount of the original administrative penalty that was assessed but not collected.

(C) DADS is not required to offer the license holder an opportunity to correct the subsequent violation.

(h) Hearing on an administrative penalty. If a license holder timely requests an administrative hearing as described in subsection (f)(3) or (f)(7) of this section, the administrative hearing is held in accordance with HHSC rules at 1 TAC Chapter 357, Subchapter I (relating to Hearings under the Administrative Procedure Act).

(i) DADS may charge interest on an administrative penalty. The interest begins the day after the date the penalty becomes due and ends on the date the penalty is paid in accordance with Texas Health and Safety Code, §247.0455(e).

(j) Amelioration of a violation.

(1) In lieu of demanding payment of an administrative penalty, the commissioner may allow a license holder to use, under DADS' supervision, any portion of the administrative penalty to ameliorate the violation or to improve services, other than administrative services, in the facility affected by the violation. Amelioration is an alternate form of payment of an administrative penalty, not an appeal, and does not remove a violation or an assessed administrative penalty from a facility's history.

(2) A license holder cannot ameliorate a violation that DADS determines constitutes immediate jeopardy to the health or safety of a resident.

(3) DADS offers amelioration to a license holder not later than 10 calendar days after the date a license holder receives a final notification of the recommended assessment of an administrative penalty

that is sent to the license holder after an informal dispute resolution process but before an administrative hearing.

(4) A license holder to whom amelioration has been offered must:

(A) submit a plan for amelioration not later than 45 calendar days after the date the license holder receives the offer of amelioration from DADS; and

(B) agree to waive the license holder's right to an administrative hearing if DADS approves the plan for amelioration.

(5) A license holder's plan for amelioration must:

(A) propose changes to the management or operation of the facility that will improve services to or quality of care of residents;

(B) identify, through measurable outcomes, the ways in which and the extent to which the proposed changes will improve services to or quality of care of residents;

(C) establish clear goals to be achieved through the proposed changes;

(D) establish a time line for implementing the proposed changes; and

(E) identify specific actions the license holder will take to implement the proposed changes.

(6) A license holder's plan for amelioration may include proposed changes to:

(A) improve staff recruitment and retention;

(B) offer or improve dental services for residents; and

(C) improve the overall quality of life for residents.

(7) DADS may require that an amelioration plan propose changes that would result in conditions that exceed the requirements of this chapter.

(8) DADS approves or denies a license holder's amelioration plan not later than 45 calendar days after the date DADS receives the plan. If DADS approves the amelioration plan, any pending request the license holder has submitted for an administrative hearing must be withdrawn by the license holder.

(9) DADS does not offer amelioration to a license holder:

(A) more than three times in a two-year period; or

(B) more than one time in a two-year period for the same or a similar violation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Department of Aging and Disability Services
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SUBCHAPTER A. INTRODUCTION

40 TAC §§92.2 - 92.4

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §§92.10 - 92.23

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. ENFORCEMENT
DIVISION 9. ADMINISTRATIVE PENALTIES

40 TAC §§92.551 - 92.595

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 10. AMELIORATION

40 TAC §§92.601 - 92.616

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§97.3, 97.17, 97.25, and 97.31 in Chapter 97, Licensing Standards for Home and Community Support Services Agencies. The amendment to §97.17 is adopted with changes to the proposed text published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7983). The amendments to §§97.3, 97.25, and 97.31 are adopted without changes to the proposed text and will not be republished.

The amendments are adopted to implement portions of Senate Bill (SB) 1318, 80th Legislature, Regular Session, 2007, which, in part, amended Texas Health and Safety Code, §142.0105. Texas Health and Safety Code, §142.0105, specifies a timeframe of not later than the 45th day before the expiration date of the license for submitting a license renewal application; allows DADS to set a late fee if a license renewal application is submitted later than the 45th day before the expiration date of the license; increases the number of days before the date a license expires for DADS to send notice to an HCSSA of the impending expiration of a license; and adds that the written notice of license expiration includes a license renewal application and instructions.

Two minor editorial changes were made to the text of §97.17(g)(1) and (g)(2) to clarify and improve the accuracy of the section.

DADS received written comments from the Texas Association for Home Care in support of the adoption.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.3

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. CRITERIA AND ELIGIBILITY, APPLICATION PROCEDURES, AND ISSUANCE OF A LICENSE

40 TAC §§97.17, 97.25, 97.31

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

§97.17. Application Procedures for a Renewal License.

(a) A renewal license is valid for two years, except as provided by subsection (b)(1) of this section. In order to continue providing services to clients, an agency must renew its license.

(b) An agency must submit an application for license renewal and a renewal license will be valid as follows:

(1) For two years beginning September 1, 2008, an agency with a license that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The agency's first renewal license issued beginning September 1, 2008, is valid for one year, and subsequent renewal licenses are valid for two years.

(2) An agency with a license that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accordance with this section. The agency's renewal licenses are valid for two years.

(c) For each license period, an agency must provide services to at least one client.

(d) DADS does not require an agency to admit a client under each category authorized under the license as a condition for renewal of the license.

(e) An agency must document the provision of services and keep documentation readily available for review by a DADS surveyor.

(f) With each renewal application, an accredited agency must submit documentation of its current accreditation by an accreditation organization approved by DADS.

(g) DADS sends written notice of expiration of a license to an agency at least 120 days before the expiration date of the license. The written notice includes an application to renew the license and instructions for completing the application.

(1) If an agency does not receive notice of expiration from DADS at least 90 days before the expiration date of a license, the agency must notify DADS and submit a written request for a renewal application.

(2) An agency must submit a complete and correct renewal application to DADS that is postmarked no later than the 45th day before the expiration date of the license.

(3) If an agency submits a renewal application that is postmarked later than the 45th day before the expiration date of a license, but no later than the expiration date of the license, DADS assesses the late fee set out in §97.3(c) of this chapter for failure to comply with paragraph (2) of this subsection.

(4) All documents submitted with the renewal application must be notarized copies or originals.

(h) Upon receipt of a renewal application and the renewal license fee, DADS reviews the application to determine whether it is complete and correct. A complete and correct renewal application includes all documents and information that DADS requests as part of the application process. If DADS receives a partial fee, the renewal application and monies are returned.

(1) DADS processes the renewal application according to the time frames in §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(2) If an agency decides not to continue the application process for a renewal license after submitting the renewal application and the renewal license fee, the agency must submit to DADS a written request to withdraw the renewal application. DADS does not refund the renewal license fee.

(3) If an agency receives written notice from DADS that some or all of the information required by this section is missing or incomplete, the required information must be submitted to DADS and postmarked no later than 30 days after the date of the notice. If an agency fails to submit the required information to DADS postmarked no later than 30 days after the date of the notice, DADS considers the renewal application incomplete and denies the application. If DADS denies the renewal application, DADS does not refund the renewal license fee.

(4) If an agency receives a written notice from DADS that a late fee is assessed in accordance with subsection (g) of this section, the agency's late fee must be postmarked no later than 30 days after the date of the notice or DADS considers the renewal application incomplete and denies the application. If DADS denies the renewal application, DADS does not refund the renewal license fee.

(i) If an agency submits a renewal application to DADS that is postmarked after the expiration date of the license, DADS denies the renewal application and does not refund the renewal license fee. The agency is not eligible to renew the license and must cease operation on the date the license expires. An agency whose license expires must apply for an initial license in accordance with §97.13 of this subchapter (relating to Application Procedures for an Initial License).

(j) If an agency submits a timely renewal application in accordance with this section, and an action to revoke, suspend, or deny renewal of the license is pending, the agency may continue to operate, and the license is valid until the agency has had an opportunity for a formal hearing as described in §97.601 of this chapter (relating to

Enforcement Actions). Until the action to revoke, suspend, or deny renewal of the license is completed, the agency must continue to submit a renewal application in accordance with this section. DADS issues a renewal license only if DADS determines the reason for the proposed action no longer exists.

(k) If a license holder fails to submit a timely renewal application in accordance with this section because the license holder is or was on active duty with the armed forces of the United States of America outside the state of Texas, the license holder may renew the license pursuant to this subsection.

(1) An individual having power of attorney from the license holder or other authority to act on behalf of the license holder may request renewal of the license. The renewal application must include a current address and telephone number for the individual requesting the renewal.

(2) An agency may request a renewal application before or after the expiration of the license.

(3) A copy of the official orders or other official military documentation showing that the license holder is or was on active military duty serving outside the state of Texas must be filed with DADS along with the renewal application.

(4) A copy of the power of attorney from the license holder or other authority to act on behalf of the license holder must be filed with DADS along with the renewal application.

(5) A license holder renewing under this subsection must pay the applicable renewal fee.

(6) A license holder is not authorized to operate the agency for which the license was obtained after the expiration of the license unless and until the license holder actually renews the license.

(7) This subsection applies to a license holder who is an individual or a partnership comprised of individuals, all of whom are or were on active duty with the armed forces of the United States of America serving outside the state of Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§97.245 - 97.247, 97.249, 97.250, 97.282, 97.283, 97.501, 97.507, 97.525, and 97.527; new §97.502 and §97.602; and the repeal of §97.602 in Chapter 97, Licensing Standards for Home and Community Support Services Agencies (HCSSAs). The amendments to §§97.247, 97.249, and 97.525; and new §97.602, are adopted with changes to the proposed text published in the August 8, 2008, issue of the *Texas Register* (33 TexReg 6346). The amendments to §§97.245, 97.246, 97.250, 97.282, 97.283, 97.501, 97.507, 97.527, new §97.502, and the repeal of §97.602 are adopted without changes to the proposed text and will not be republished.

The amendments, new sections and repeal are adopted to comply with certain sections in Senate Bill 1318, 80th Legislature, 2007, which amended the Texas Health and Safety Code, Chapter 142. Texas Health and Safety Code, §142.009, was amended to add that complaints investigated by DADS include allegations of abuse, neglect, or exploitation of a child. The amendments and a new section on abuse, neglect, and exploitation are adopted to clarify DADS' authority to investigate allegations of abuse, neglect, or exploitation of a child served by a HCSSA and allegations of abuse, neglect, or exploitation of an elderly or disabled client in a facility regulated by DADS. In addition, the amendments and new section on abuse, neglect, and exploitation are adopted to address the prevention, reporting and investigation of abuse, neglect and exploitation of a client by a HCSSA employee, volunteer, or contractor in accordance with provisions in the HCSSA statute and other Texas laws and rules that apply to HCSSAs, DADS, and the Department of Family and Protective Services (DFPS).

Texas Health and Safety Code, §142.017, was amended to add criteria for which DADS may assess an administrative penalty without providing time to correct a violation before assessing the penalty. The amendments, new rules, and repeal on the topic of administrative penalties are adopted to clarify and update language on an administrative penalty for a violation of law relating to advance directives, to add criteria for which DADS may assess a penalty without providing an opportunity to correct the violation, and to add, update and amend violations that meet the added criteria.

The amendment to §97.247 is changed to add "whose duties would or do include face-to-face contact with a client" to the text of §97.247(a) to clarify that the rules in subsection (a) only apply to employees who have face-to-face contact with a client. "The effective date of this rule" in §97.247(c) is changed to "January 15, 2009."

The amendment to §97.249 is changed to add to subsection (c) that "immediately," as used in this rule, means within 24 hours, to improve clarity and compliance with the rule by providing a standardized timeframe for reporting abuse, neglect, and exploitation. Section 97.249(c)(1) is changed to add the secure website of DFPS and its toll-free number, for a HCSSA to use to report abuse, neglect, and exploitation of a client.

The amendment to §97.525 is changed to add a cross-reference in subsection (a) to §97.523, the rule that describes the requirements for HCSSA personnel to participate in an entrance conference held by a DADS surveyor.

The new §97.602 is changed to clarify and improve the accuracy of the rule cite for §97.248(a) - (b)(1) - (4) and the subject matter descriptions for rule cites §97.292(a) and §97.292(b) on the Severity Level A Violations table.

DADS received written comments from the Texas Association of Home Care, from one HCSSA administrator, and from one

individual commenter. A summary of the comments and the responses follow.

Comment: Two commenters suggested adding "who will have face-to-face contact with a client" after "immediately discharge any employee" to §97.247(a)(6) to clarify that employees without face-to-face contact with a client may continue to work in a HCSSA in other capacities that would not, or do not, involve face-to-face contact with a client.

Response: The agency added "whose duties would or do include face-to-face contact with a client" to the rule text in §97.247(a) to clarify that the rules in subsection (a) only apply to applicants and employees whose duties would or do include face-to-face contact with a client.

Comment: A commenter voiced concern about removing the definition of "reportable conduct" from §97.249 since it provides clear guidance on what is considered reportable abuse, neglect and exploitation and because removing this definition will require a HCSSA to report abuse, neglect, and exploitation that may not be reportable to the Employee Misconduct Registry maintained by DADS under the Texas Health and Safety Code, Chapter 253.

Response: The agency deleted "reportable conduct" from §97.249 because the statutory definitions for "reportable conduct" are for referrals by DADS and DFPS to the employee misconduct registry and are not the definitions used by a HCSSA to determine what is considered reportable under §97.249. The proposed amendment to §97.249 provides the statutory references for the definitions of abuse, neglect and exploitation of a client that a HCSSA must use to report incidents of abuse, neglect and exploitation for both an adult and a child. The agency did not make a change based on this comment.

Comment: Two commenters suggested adding a paragraph (5) to §97.249(a) to define that "immediately," as used in subsection (c), means within 24 hours, to allow for consistent application of the rule in terms of a reporting timeframe.

Response: To allow for consistent application of the rule in terms of a reporting timeframe, §97.249(c) was changed to state that "immediately" means within 24 hours because the rule in subsection (c) specifically requires reporting abuse, neglect, and exploitation. Further, because DFPS allows reports to be made via their secure website, this method of reporting was added to §97.249(c)(1).

Comment: A commenter suggested defining "immediately" in §97.250(b)(1) for HCSSA investigations of abuse, neglect, and exploitation as meaning within 24 hours to eliminate any confusion. The commenter compared this suggestion to the suggestion to define "immediately" in §97.249.

Response: Section 97.250(b)(1) requires a HCSSA to immediately initiate its own investigation of known and alleged acts of abuse, neglect, and exploitation by HCSSA employees, volunteers and contractors upon witnessing the act or upon the HCSSA's receipt of the allegation. The agency did not make the change suggested because a HCSSA in certain situations may need to respond in less than 24 hours to protect a client from an alleged perpetrator of abuse, neglect, or exploitation who is an agency employee, volunteer, or contractor.

Comment: Two commenters suggested adding "adult surrogate," as defined in the Texas Health and Safety Code, Chapter 313, to §97.282, subsections (e) and (f), to clarify that a surrogate does not need a legal power of attorney to act as a client's "legal representative."

Response: "Legal representative," as used in §97.282(e), (f)(1), (f)(2)(A), and (h), means a person who may exercise the rights of a client of any age to the extent permitted by law. The agency did not make a change based on this comment because the term "legal representative" includes an adult surrogate as allowed by the Texas Health and Safety Code, Chapter 313.

Comment: A commenter suggested adding a new subsection to §97.283, relating to Advance Directives. The new subsection would not be a mandate, but would inform a HCSSA that under Section 683 of the Texas Probate Code, it may refer an incompetent or otherwise incapacitated adult client, who does not have a medical power of attorney or a legal guardian, to the court in the client's county that hears guardianship applications. The comment also included that this new subsection is consistent with DADS' Provider Letter 2002-10 and would help ensure other rights of such a client, such as the right to participate in planning care, a core right of persons receiving services funded by Medicaid and Medicare and who are sixty years of age and older.

Response: The HCSSA licensing standards in §97.282 require a HCSSA to adopt and enforce written policies to protect and promote a client's rights, including the rights of the elderly for a person sixty years of age and older, and to ensure that any legal representative may exercise the client's rights to the extent permitted by law in the case of a client who has not been adjudged incompetent. If a HCSSA recognizes that an elderly or disabled client is incompetent, and is in need of a legal guardian, the HCSSA could refer the client to DFPS, or under Section 683 of the Texas Probate Code, to the court in the client's county that hears guardianship applications. DADS' Provider Letter 2002-10 provides this information specifically to nursing facilities. The agency did not make the change suggested because this is information DADS can provide without amending the HCSSA rules.

Comment: Two commenters suggested deleting §97.501(a)(4), thought to be a duplication of §97.501(a)(3)(i), regarding surveys and investigations conducted by DADS.

Response: Section 97.501(a)(3)(i) addresses complaints and §97.501(a)(4) addresses self-reported incidents, for which DADS' investigative procedures differ. The agency did not make the change suggested because these are not duplicative rules.

Comment: A commenter suggested clarifying the word "days" in §97.527(g)(3) and (4) regarding a HCSSA submitting an acceptable plan of correction since in §97.527(f) it is clear that DADS has 10 "working" days to provide official written notification of the survey findings. The commenter also suggested clarifying "business" versus "working" days.

Response: The definitions in §97.2 include a definition for "day" to clarify that any reference to a "day," unless otherwise specified in the text, means a calendar day, which includes weekends and holidays. "Working day" is defined in §97.2 as any day except Saturday, Sunday, a state holiday, or a federal holiday. "Business days" is not used in Chapter 97 rules. The agency did not make a change based on this comment because the clarification requested is provided in the definitions.

Comment: Two commenters opposed the deletion of "required agency personnel" from §97.525(a) to ensure a DADS surveyor does not start an entrance conference without the required agency personnel as specified in §97.523, relating to Personnel Requirements for a Survey.

Response: The agency deleted "required agency personnel" from §97.525(a) because the rule does not specify who the required agency personnel are. However, the required personnel for conducting an entrance conference are specified in §97.523, so the agency added a cross-reference to §97.523 in §97.525(a) in response to this comment.

Comment: According to the HCSSA statute and new §97.602, all Severity Level B violations are subject to an administrative penalty with no right to correct. Therefore, careful consideration must be given to whether the violations listed on the Severity Level B violations table meet the definition of a Severity Level B violation as described in §97.602(h)(3)(B).

Response: The criteria in §97.602(e)(1) - (3), for which DADS may assess an administrative penalty without providing an opportunity to correct a violation, are the same as the definition of a Severity Level B violation as described in §97.602(h)(3)(B). Therefore, the agency carefully considered the violations listed on the Severity Level B violations table in new §97.602 as violations that have the potential to meet the definition of a Level B violation. However, it is the actual outcome or potential outcome of a violation on the health and safety of a client, and on the HCSSA's capacity to provide care, that determines the seriousness of the violation. Therefore, a HCSSA may be given the opportunity to correct a Level B violation if DADS determines the actual outcome or potential outcome of a violation listed on the Severity Level B table did not meet the criteria in §97.602(e)(1) - (3). Also, §97.602(b) specifies the criteria used by DADS for assessing penalties and what DADS considers in determining which violation warrants a penalty. The agency did not make a change based on this comment.

SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 3. AGENCY ADMINISTRATION

40 TAC §§97.245 - 97.247, 97.249, 97.250

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

§97.247. Employability and Use of Unlicensed Persons.

(a) An agency must do the following for unlicensed applicants for employment and employees whose duties would or do include face-to-face contact with a client.

(1) Conduct the criminal history check authorized under the Texas Health and Safety Code, Chapter 250 (relating to Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities) on an unlicensed applicant for employment at the agency whose duties would or do involve face-to-face contact with a client.

(2) Conduct the authorized criminal history check on an unlicensed employee when job duties change so that they would or do include face-to-face contact with a client.

(3) As required by Texas Health and Safety Code §250.006, ensure the agency does not employ an unlicensed person whose criminal history record information includes a conviction that bars employment.

(4) Before an agency hires or rehires an unlicensed employee whose duties would or do involve face-to-face contact with a client on or after February 2, 2002, the agency must search the nurse aide registry (NAR) and the employee misconduct registry (EMR) by calling DADS' toll-free number, 1-800-452-3934, or by using DADS' Employability Status Search website at http://www.dads.state.tx.us/providers/employability/esearch.cfm, to verify that the applicant is not listed with a finding concerning abuse, neglect, or exploitation or mistreatment of a client of an agency or a facility, or misappropriation of a client's property as required by Texas Health and Safety Code §253.008.

(5) Provide written information about the EMR to all unlicensed employees, including a statement that a person listed in the EMR is not employable.

(6) As required by Texas Health and Safety Code §250.003, when the agency becomes aware of a finding or conviction, immediately discharge any employee:

(A) who is designated in the NAR or the EMR with a finding concerning abuse, neglect, or exploitation or mistreatment of a client of an agency or a facility, or misappropriation of a client's property; or

(B) whose criminal history check reveals conviction of a crime that bars employment or that the agency determines is a contraindication to employment.

(b) An agency must ensure the following for unlicensed volunteers with face-to-face client contact starting on or after June 1, 2006.

(1) Conduct a criminal history check on unlicensed volunteers whose duties would or do involve face-to-face contact with a client.

(2) Ensure that the criminal history check specified in paragraph (1) of this subsection is conducted prior to the unlicensed volunteer's first face-to-face contact with a client of the agency.

(3) Ensure the agency does not use an unlicensed volunteer whose criminal history information includes a conviction that would bar employment in a facility under Texas Health and Safety Code §250.006.

(4) Before using an unlicensed volunteer whose duties would or do involve face-to-face contact with a client, search the NAR and the EMR by calling DADS' toll-free number, 1-800-452-3934, or by using DADS' Employability Status Search website at http://www.dads.state.tx.us/providers/employability/esearch.cfm, to verify that the unlicensed volunteer is not listed with a finding concerning abuse, neglect, or exploitation or mistreatment of a client of an agency or a facility, or misappropriation of a client's property.

(5) Provide written information about the EMR to all unlicensed volunteers, including a statement that a person listed in the EMR cannot be used by the agency.

(6) When the agency becomes aware of a finding or conviction, immediately stop using an unlicensed volunteer:

(A) who is designated in the NAR or the EMR with a finding concerning abuse, neglect, or exploitation or mistreatment of a client of an agency or a facility, or misappropriation of a client's property; or

(B) whose criminal history check reveals conviction of a crime listed in Texas Health and Safety Code §250.006.

(c) An agency must ensure the following for unlicensed contractors with face-to-face client contact starting on or after January 15, 2009.

(1) That a criminal history check is conducted on an unlicensed contractor whose duties would or do involve face-to-face contact with a client of the agency.

(2) That the criminal history check specified in paragraph (1) of this subsection is conducted prior to the unlicensed contractor's first face-to-face contact with a client of the agency.

(3) Ensure the agency does not use an unlicensed contractor whose criminal history information includes a conviction that would bar employment in a facility under Texas Health and Safety Code §250.006.

(4) Before using an unlicensed contractor whose duties would or do involve face-to-face contact with a client, that a search of the NAR and the EMR is conducted by calling DADS' toll-free number, 1-800-452-3934, or by using DADS' Employability Status Search website at http://www.dads.state.tx.us/providers/employability/esearch.cfm, to verify that the unlicensed contractor is not listed with a finding concerning abuse, neglect, or exploitation or mistreatment of a client of an agency or a facility, or misappropriation of a client's property.

(5) That written information about the EMR is provided to all unlicensed contractors, including a statement that a person listed in the EMR cannot be used by the agency.

(6) When the agency becomes aware of a finding or conviction, immediately stop using an unlicensed contractor:

(A) who is designated in the NAR or the EMR with a finding concerning abuse, neglect, or exploitation or mistreatment of a client of an agency or a facility, or misappropriation of a client's property; or

(B) whose criminal history check reveals conviction of a crime listed in Texas Health and Safety Code §250.006.

(d) Upon request by a DADS surveyor, the agency must provide documentation to demonstrate compliance with subsections (a) - (c) of this section.

§97.249. Self-Reported Incidents of Abuse, Neglect, and Exploitation.

(a) The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.

(1) Abuse, neglect, and exploitation of a client 18 years of age and older have the meanings assigned by the Texas Human Resources Code, §48.002.

(2) Abuse, neglect, and exploitation of a child have the meanings assigned by the Texas Family Code, §261.401.

(3) Employee means an individual directly employed by an agency, a contractor, or a volunteer.

(4) Cause to believe means that an agency knows, suspects, or receives an allegation regarding abuse, neglect, or exploitation.

(b) An agency must adopt and enforce a written policy relating to the agency's procedures for reporting alleged acts of abuse, neglect, and exploitation of a client by an employee of the agency.

(c) If an agency has cause to believe that a client served by the agency has been abused, neglected, or exploited by an agency employee, the agency must report the information immediately, meaning within 24 hours, to:

(1) the Department of Family and Protective Services (DFPS) at 1-800-252-5400, or through the DFPS secure website at www.txabusehotline.org; and

(2) DADS at 1-800-458-9858.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. PROVISION AND COORDINATION OF TREATMENT SERVICES

40 TAC §97.282, §97.283

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

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SUBCHAPTER E. LICENSURE SURVEYS
DIVISION 1. GENERAL

40 TAC §§97.501, 97.502, 97.507

The amendments and new section are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

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DIVISION 2. THE SURVEY PROCESS

40 TAC §97.525, §97.527

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

§97.525. Survey Procedures.

(a) Before beginning a survey, a surveyor holds an entrance conference, as specified in §97.523 of this subchapter (relating to Personnel Requirements for a Survey), to explain the purpose of the survey and the survey process and provides an opportunity to ask questions.

(b) During a survey, a surveyor:

(1) conducts at least three home visits to determine an agency's compliance with licensing requirements;

(2) reviews any agency records that the surveyor believes are necessary to determine an agency's compliance with licensing requirements; and

(3) evaluates an agency's compliance with each standard.

(c) An agency accredited by CHAP or JCAHO must have the documentation of accreditation available at the time of a survey.

(d) DADS keeps agency records confidential, except as allowed by Texas Health and Safety Code, §142.009(d).

(e) A surveyor may remove original agency records from an agency only with the consent of the agency as provided in Texas Health and Safety Code, §142.009(e).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. ENFORCEMENT

40 TAC §97.602

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

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For further information, please call: (512) 438-3734

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40 TAC §97.602

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

§97.602. Administrative Penalties.

(a) Assessing penalties. DADS may assess an administrative penalty against a person who violates:

(1) the statute;

(2) a provision in this chapter for which a penalty may be assessed; or

(3) Occupations Code, §102.001, Soliciting Patients, if related to the provision of home health, hospice, or personal assistance services.

(b) Criteria for assessing penalties. DADS assesses administrative penalties in accordance with the schedule of appropriate and graduated penalties established in this section.

(1) The schedule of appropriate and graduated penalties for each violation is based on the following criteria:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard of the violation to the health or safety of clients;

(B) the history of previous violations by a person or a controlling person with respect to that person;

(C) whether the affected agency identified the violation as part of its internal quality assurance process and made a good faith, substantial effort to correct the violation in a timely manner;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other matters that justice may require.

(2) In determining which violation warrants a penalty, DADS considers:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard of the violation to the health or safety of clients; and

(B) whether the affected agency identified the violation as part of its internal quality assurance program and made a good faith, substantial effort to correct the violation in a timely manner.

(c) Opportunity to correct. Except as provided in subsections (e) and (f) of this section, DADS provides an agency with an opportunity to correct a violation in accordance with the time frames established in §97.527(g)(2) of this chapter (relating to Post-Survey Procedures) before assessing an administrative penalty if a plan of correction has been implemented.

(d) Minor violations.

(1) DADS may not assess an administrative penalty for a minor violation unless the violation is of a continuing nature or is not corrected in accordance with an accepted plan of correction.

(2) DADS may assess an administrative penalty for a subsequent occurrence of a minor violation when cited within three years from the date the agency first received written notice of the violation.

(3) DADS does not assess an administrative penalty for a subsequent occurrence of a minor violation when cited more than three years from the date the agency first received written notice of the violation.

(e) No opportunity to correct. DADS may assess an administrative penalty without providing an agency with an opportunity to correct a violation if DADS determines that the violation:

(1) results in serious harm to or death of a client;

(2) constitutes a serious threat to the health or safety of a client;

(3) substantially limits the agency's capacity to provide care;

(4) involves the provisions of Texas Human Resources Code, Chapter 102, Rights of the Elderly;

(5) is a violation in which a person:

(A) makes a false statement, that the person knows or should know is false of a material fact:

(i) on an application for issuance or renewal of a license or in an attachment to the application; or

(ii) with respect to a matter under investigation by DADS;

(B) refuses to allow a representative of DADS to inspect a book, record, or file required to be maintained by an agency;

(C) willfully interferes with the work of a representative of DADS or the enforcement of this chapter;

(D) willfully interferes with a representative of DADS preserving evidence of a violation of this chapter or a rule, standard, or order adopted or license issued under this chapter;

(E) fails to pay a penalty assessed by DADS under this chapter not later than the 10th day after the date the assessment of the penalty becomes final; or

(F) fails to submit:

(i) a plan of correction not later than the 10th day after the date the person receives a statement of licensing violations; or

(ii) an acceptable plan of correction not later than the 30th day after the date the person receives notification from DADS that the previously submitted plan of correction is not acceptable.

(f) Violations relating to Advance Directives. As provided in Texas Health and Safety Code, §142.0145, DADS assesses an administrative penalty of $500 for a violation of §97.283 of this chapter (relating to Advance Directives) without providing an agency with an opportunity to correct the violation.

(g) Penalty calculation and assessment.

(1) Each day that a violation occurs before the date on which the person receives written notice of the violation is considered one violation.

(2) Each day that a violation occurs after the date on which an agency receives written notice of the violation constitutes a separate violation.

(h) Schedule of appropriate and graduated penalties.

(1) If two or more rules listed in paragraphs (2) and (3) of this subsection relate to the same or similar matter, one administrative penalty may be assessed at the higher severity level violation.

(2) Severity Level A violations.

(A) The penalty range for a Severity Level A violation is $100 - $250 per violation.

(B) A Severity Level A violation is a violation that has or has had minor or no client health or safety significance.

(C) DADS assesses a penalty for a Severity Level A violation only if the violation is of a continuing nature or was not corrected in accordance with an accepted plan of correction.

(D) DADS may assess a separate Severity Level A administrative penalty for each of the rules listed in the following table. Figure: 40 TAC §97.602(h)(2)(D)

(3) Severity Level B violations.

(A) The penalty range for a Severity Level B violation is $500 - $1,000 per violation.

(B) A Severity Level B violation is a violation that:

(i) results in serious harm to or death of a client;

(ii) constitutes an actual serious threat to the health or safety of a client; or

(iii) substantially limits the agency's capacity to provide care.

(C) The penalty for a Severity Level B violation that:

(i) results in serious harm to or death of a client is $1,000;

(ii) constitutes an actual serious threat to the health or safety of a client is $500 - $1,000; and

(iii) substantially limits the agency's capacity to provide care is $500 - $750.

(D) As provided in subsection (e) of this section, a Severity Level B violation is a violation for which DADS may assess an administrative penalty without providing an agency with an opportunity to correct the violation.

(E) DADS may assess a separate Severity Level B administrative penalty for each of the rules listed in the following table. Figure: 40 TAC §97.602(h)(3)(E)

(i) Violations for which DADS may assess an administrative penalty of $500.

(1) DADS may assess an administrative penalty of $500 for each of the violations listed in subsection (e)(4) and (5) of this section, without providing an agency with an opportunity to correct the violation.

(2) A separate penalty may be assessed for each of these violations.

(j) Proposal of administrative penalties.

(1) If DADS assesses an administrative penalty, DADS provides a written notice of violation letter to an agency. The notice includes:

(A) a brief summary of the violation;

(B) the amount of the proposed penalty; and

(C) a statement of the agency's right to a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(2) An agency may accept DADS' determination not later than 20 days after the date on which the agency receives the notice of violation letter, including the proposed penalty, or may make a written request for a formal administrative hearing on the determination.

(A) If an agency notified of a violation accepts DADS' determination, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(B) If an agency notified of a violation does not accept DADS' determination, the agency must submit to the Health and Human Services Commission a written request for a formal administrative hearing on the determination and must not pay the proposed penalty. Remittance of the penalty to DADS is deemed acceptance by the agency of DADS' determination, is final, and waives the agency's right to a formal administrative hearing.

(C) If an agency notified of a violation fails to respond to the notice of violation letter within the required time frame, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(D) If an agency requests a formal administrative hearing, the hearing is held in accordance with the statute, §142.0172, §142.0173, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 23, 2008.

TRD-200806698
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 15, 2009
Proposal publication date: August 8, 2008
For further information, please call: (512) 438-3734

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CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§98.15, 98.21, and 98.82; and adopts new §98.63, in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements. The amendments to §98.15 and §98.82 are adopted with changes to the proposed text published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7987). The amendment to §98.21 and new §98.63 are adopted without changes to the proposed text.

The amendments and new section are adopted to implement portions of Senate Bill (SB) 1318, 80th Legislature, Regular Session, 2007. SB 1318, in part, amended Texas Human Resources Code, §103.007, to provide that an applicant for renewal of an adult day care facility license that submits an application for renewal later than the 45th day before the expiration date of the license is subject to a late fee in accordance with DADS rules. The proposed amendments establish the conditions under which an applicant for license renewal would have to pay a late fee and set the amount of the late fee at $25.

The amendment to §98.82 is adopted to provide clear direction to adult day care facilities about the procedure for submitting a plan of correction and to establish in rule what the plan of correction must address.

New §98.63 is adopted to ensure that adult day care facilities comply with the provisions of Texas Occupations Code, §303.0015, added by SB 993, 80th Legislature, Regular Session, 2007, which relates to nursing peer review, and ensure that employees or contractors of an adult day care facility comply with their professional practice acts or title acts relating to reporting and peer review.

DADS received no comments regarding adoption of the amendments and new section. However, minor editorial changes were made to the text of §98.15 to clarify and improve the accuracy of the section. References to an application being "filed" were changed to reflect that an application is "submitted" for consistency within the section. Two typographical errors were corrected in §98.82.

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §98.15, §98.21

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

§98.15. Renewal Procedures and Qualifications.

(a) Each license issued under this chapter must be renewed before the license expiration date. Each license expires two years from the date issued, except as provided by subsection (b)(1) of this section. A license issued under this chapter is not automatically renewed.

(b) A facility must submit an application for license renewal and a renewal license will be valid as follows:

(1) For two years beginning September 1, 2008, a facility with a facility identification number that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's first renewal license issued beginning September 1, 2008, is valid for one year, and subsequent renewal licenses are valid for two years.

(2) A facility with a facility identification number that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's renewal licenses are valid for two years.

(c) The submission of a license fee alone does not constitute an application for renewal.

(d) To renew a license, a license holder must submit an application for renewal with DADS no later than the 45th day before the expiration date of the current license. DADS considers that an application for renewal has met the submission deadline, if the license holder:

(1) submits a complete application to DADS, and DADS receives that complete application no later than the 45th day before the expiration date of the current license;

(2) submits an incomplete application to DADS with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS receives the incomplete application and letter no later than the 45th day before the expiration date of the current license; or

(3) submits a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information to DADS, DADS receives the application during the 45-day period ending on the date the current license expires, and the license holder pays a late fee in accordance with §98.21(b) of this subchapter (relating to License Fees) in addition to the license renewal fee.

(e) If the application is postmarked by the submission deadline, the application will be considered to be timely filed if received in DADS' Regulatory Services Licensing and Credentialing Section within 15 days after the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of DADS that the delay was due to the shipper. It is the license holder's responsibility to ensure that the application is timely received by DADS.

(f) For purposes of Texas Government Code, §2001.054, DADS considers that an individual has submitted a timely and sufficient application for the renewal of a license if the license holder's application has met the submission deadlines in subsections (d) and (e) of this section. Failure to submit a timely and sufficient application will result in the expiration of the license on the expiration date listed on the license.

(g) An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §98.11 of this subchapter (relating to Criteria for Licensing) and §98.13 of this subchapter (relating to Application Disclosure Requirements).

(h) The application for renewal must contain the same information required for an original application and the license fee as described in §98.21 of this subchapter.

(i) The renewal of a license may be denied for the same reasons an original application for a license may be denied (see §98.19 of this subchapter (relating to Criteria for Denying a License or Renewal of a License)).

(j) The facility must have an annual inspection by the local fire marshal and must submit a copy of the most current inspection as part of the renewal procedures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2008.

TRD-200806664
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 15, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

40 TAC §98.63

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2008.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 15, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §98.82

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

§98.82. Determinations and Actions Pursuant to Inspections.

(a) DADS determines if a facility meets the licensing rules, including both physical plant and facility operation requirements.

(b) Violations of regulations are listed on forms designed for the purpose of the inspection.

(c) At the conclusion of an inspection or survey, the violations are discussed in an exit conference with the facility's management. A written list of the violations is left with the facility at the time of the exit conference.

(d) If, after the initial exit conference, additional violations are cited, the violations are communicated to the facility within 10 working days after the initial exit conference.

(e) DADS provides a clear and concise summary in nontechnical language of each licensure inspection, inspection of care, and complaint investigation, if applicable. The summary outlines significant violations noted at the time of the inspection or survey, but does not include names of clients, staff, or any other information that would identify individual clients or other prohibited information under general rules of public disclosure. The summary is provided to the facility at the time the report of contact or similar document is provided.

(f) Upon receipt of the final statement of violations, the facility has 10 working days to submit an acceptable plan of correction to the DADS Regulatory Services regional director. An acceptable plan of correction must address the following:

(1) how the facility will accomplish the corrective action for those clients affected by each violation;

(2) how the facility will identify other clients with the potential to be affected by the same violation;

(3) how the facility will put the corrective measure into practice or make systemic changes to ensure that the violation does not recur;

(4) how the facility will monitor the corrective action to ensure that the violation is corrected and will not recur; and

(5) the date the corrective action will be completed.

(g) If the provider and the inspector cannot resolve a dispute regarding a violation of regulations, the provider is entitled to an informal dispute resolution (IDR) at the regional level for all violations. For a violation that resulted in an adverse action, the provider is entitled to an IDR at either the regional or state office level.

(1) A written request and all supporting documentation must be submitted to the Regional Director, Regulatory Services, for a regional IDR; or to Regulatory Services, Texas Department of Aging and Disability Services, P.O. Box 149030, E-351, Austin, Texas 78714-9030, for a central office IDR, no later than the tenth day after receipt of the official statement of violations.

(2) DADS completes the IDR process no later than the 30th day after receipt of a request from a facility.

(3) Violations deemed invalid in an IDR will be so noted in DADS' records.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2008.

TRD-200806666
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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Proposal publication date: September 19, 2008
For further information, please call: (512) 438-3734

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

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Texas Medical Board

Title 22, Part 9

The Texas Medical Board proposes to review Chapter 162, Supervision of Medical School Students, §162.1 and §162.2, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §162.1.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200806709
Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
Filed: December 29, 2008

The Texas Medical Board proposes to review Chapter 189, Compliance Program, §§189.1 - 189.14, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §§189.1, 189.2, and 189.4.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200806710
Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
Filed: December 29, 2008

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 25 TAC §289.256(www)

Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Records/Documents
§289.201(d)(1)	Records of receipt, transfer, and disposal of radioactive material	Until disposal is authorized by the agency
§289.201(g)(7), §289.202(bbb)	Records of leak tests for specific devices and sealed sources	3 years
§289.203(b)(1)(B)	Current applicable sections of this chapter as listed in the radioactive material license	Until termination of the radioactive material license
§289.203(b)(1)(B)	Copy of the current radioactive material license	Until termination of the radioactive material license
§289.203(b)(1)(C), §289.256(f)(3)(A)	Current operating, safety, and emergency procedures	Until termination of the radioactive material license
§289.256 (f)(3)(C)(i)	Qualifications of RSO	Duration of employment
§289.256(f)(3)(C)(ii)	Qualifications of authorized users	Duration of employment
§289.256(f)(3)(C)(iii)	Qualifications of authorized medical physicist	Duration of employment
§289.256(f)(3)(C)(iv)	Qualifications of authorized nuclear pharmacist, if applicable	Duration of employment
§289.256(g)(1)	Authority of RSO	Duration of employment
§289.256(g)(5)	Qualifications and dates of service for temporary RSO	3 years
§289.256(t)(3)	Written directives	3 years
§289.256(v)(4)	Calibration of instruments (dose calibrators)	3 years
§289.256(z)(2)	Sealed source/brachytherapy inventory	3 years
§289.256(bb)(3)	Surveys for ambient radiation exposure rate	3 years
§289.256(cc)(3) §289.256(eee)(2)	Patient release	3 years after date of release
§289.256(dd)(3)	Mobile nuclear medicine service client letters	Duration of licensee/client relationship
§289.256(dd)(3)	Mobile nuclear medicine service surveys	3 years
§289.256(ee)(2)	Decay in storage/disposal	3 years
§289.256(ii)(3)	Molybdenum-99 concentrations	3 years
§289.256(ll)(2)	Safety instructions - unsealed radioactive materials	3 years
§289.256(ss)(3)	Surveys after sealed source implant and removal	3 years
§289.256(tt)(3)	Brachytherapy sealed sources accountability	3 years
§289.256(uu)(2)	Safety instructions - brachytherapy	3 years
§289.256(ww)(4)	Calibration measurements of brachytherapy sealed sources	3 years
§289.256(xx)(2)	Strontium 90 activity of source	Duration of life of source

Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Records/Documents
§289.256(fff)(4)	Installation, maintenance, adjustment and repair-remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units	3 years
§289.256(iii)(3)	Dosimetry equipment calibration, intercomparison and comparison	Until termination of the radioactive material license
§289.256(jjj)(7)	Calibration - teletherapy units	3 years
§289.256(kkk)(9)	Calibration - remote afterleader units	3 years
§289.256(lll)(7)	Calibration - gamma stereotactic radiosurgery units	3 years
§289.256(mmm)(6)	Spot checks - teletherapy units	Until licensee no longer possesses unit
§289.256(nnn)(6)	Spot checks - remote afterloader	3 years
§289.256(ooo)(8)	Spot checks - gamma stereotactic radiosurgery units	3 years
§289.256(ppp)(5)	Technical requirements for mobile remote afterloader units	3 years
§289.256(qqq)(3)	Radiation surveys	Duration of the use of the unit
§289.256(rrr)(3)	Five-year inspection for teletherapy and gamma sterotactic radiosurgery units	Duration of the use of the unit
§289.256(uuu)(9)	Annotated report - medical event	Until termination of the radioactive material license
§289.256(vvv)(8)	Annotated report - dose to embryo/fetus or nursing child	Until termination of the radioactive material license

Figure: 40 TAC §92.551(d)

ADMINISTRATIVE PENALTY SCHEDULE	SMALL FACILITY (4-16 beds)		LARGE FACILITY (17+ beds)	
	Business entity owns one facility	Business entity owns multiple facilities	Business entity owns one facility	Business entity owns multiple facilities
§92.3. Types of Assisted Living Facilities	$300	$450	$500	$650
§92.4. License Fees	$300	$400	$500	$600
§92.11. Criteria for Licensing	$300	$450	$500	$650
§92.16. Change of Ownership	$300	$400	$500	$600
§92.18. Increase in Capacity	$300	$400	$500	$600
§92.41. Standards for Type A, Type B, and Type E Assisted Living Facilities				
(a) employees	$350	$550	$750	$950
(b) social services	$200	$300	$400	$500
(c) resident assessment	$400	$550	$600	$750
(d) resident policies	$250	$350	$450	$550
(e) admission policies	$300	$400	$500	$600
(f) inappropriate placement in Type A or Type B facilities	Not applicable	Not applicable	Not applicable	Not applicable
(g) advance directives	$500	$500	$500	$500
(h) resident records	$200	$300	$400	$500
(i) personnel records	$200	$300	$400	$500
(j) medications	$400	$500	$600	$700
(k) accident, injury, or acute illness	$400	$500	$600	$700
(l) resident finances	$200	$300	$400	$500
(m) food and nutrition services	$400	$550	$700	$850
(n) infection control	$400	$550	$700	$850
(o) access to residents	$150	$200	$250	$300
(p) restraints	$700	$800	$900	$1,000
(q) accreditation status	$700	$800	$900	$1,000
§92.51. Licensure of Facilities for Persons with Alzheimer's Disease	$200	$300	$400	$500
§92.53. Standards for Certified Alzheimer's Assisted Living Facilities	$400	$500	$600	$700
§92.54. Advertisements, Solicitations, and Promotional Material	$250	$350	$450	$550
§92.61. Facility Construction-Introduction and Application	$300	$400	$500	$600
§92.62. General Requirements	$350	$450	$550	$650
§92.71. Introduction and Application: Type E Facilities	$300	$400	--	--
§92.72. General Requirements: Type E Facilities	$300	$400	--	--

ADMINISTRATIVE PENALTY SCHEDULE	SMALL FACILITY (4-16 beds)		LARGE FACILITY (17+ beds)	
	Business entity owns one facility	Business entity owns multiple facilities	Business entity owns one facility	Business entity owns multiple facilities
§92.81. Inspections and Surveys	$300	$400	$500	$600
§92.82. Determinations and Actions Pursuant to Inspections	$200	$300	$400	$500
§92.102. Abuse, Neglect, Exploitation Reportable to DADS by Facilities	$700	$800	$900	$1,000
§92.123. Investigation of Facility Employees	$450	$550	$650	$750
§92.125. Resident's Bill of Rights and Provider Bill of Rights				
(a) resident's bill of rights	--	--	--	--
(1) post and provide copy of bill	$100	$150	$200	$250
(2) right to exercise civil rights	$150	$200	$250	$300
(3) each resident has the right to:	--	--	--	--
(A) be free from physical, mental abuse, corporal punishment, physical, chemical restraints for discipline/convenience	$700	$800	$900	$1,000
(B) participate in activities	$150	$200	$250	$300
(C) religion of choice	$150	$200	$250	$300
(D) if MR, participate in behavior modification with guardian consent	$150	$200	$250	$300
(E)(i)-(iii) be treated with respect, consideration, dignity	$200	$250	$300	$350
(F) safe, decent living environment	$100	$150	$200	$250
(G) communicate in native language	$100	$150	$200	$250
(H) complain about care, treatment	$200	$250	$300	$350
(I) receive and send mail	$100	$150	$200	$250
(J) unrestricted communication	$150	$200	$250	$300
(K) make community contacts	$100	$150	$200	$250
(L) manage financial affairs	$100	$150	$200	$250
(M)(i)-(ii) access resident records	$100	$150	$200	$250
(N) choose physician and be informed about treatment and care	$100	$150	$200	$250
(O) help develop individual service plan	$100	$150	$200	$250
(P)(i)-(ii) opportunity to refuse medical treatment or services	$100	$150	$200	$250

ADMINISTRATIVE PENALTY SCHEDULE	SMALL FACILITY (4-16 beds)		LARGE FACILITY (17+ beds)	
	Business entity owns one facility	Business entity owns multiple facilities	Business entity owns one facility	Business entity owns multiple facilities
(Q) unaccompanied access to telephone	$100	$150	$200	$250
(R) privacy	$100	$150	$200	$250
(S) retain and use personal possessions	$100	$150	$200	$250
(T) determine personal preference in dress, hair style, personal effects	$100	$150	$200	$250
(U) retain and use personal property	$100	$150	$200	$250
(V) refuse to perform services	$100	$150	$200	$250
(W)(i)-(ii) be informed about Medicare, Medicaid, and covered items/services	$100	$150	$200	$250
(X)(i)-(v) not be transferred/discharged except under specific conditions	$300	$350	$400	$450
(Y)(i)-(v) not be transferred/discharged except in an emergency without specific written notice	$300	$350	$400	$450
(Z) leave facility temporarily or permanently	$100	$150	$200	$250
(AA) access the Ombudsman program	$100	$150	$200	$250
(BB) execute an advance directive or designate a guardian for decisions	$200	$250	$300	$350
§92.127. Required Posting	$250	$350	$450	$550
§92.129. Authorized Electronic Monitoring (AEM)	$100	$150	$200	$250
§§92.351-92.374. Emergency License Suspension and Closing Order	$150	$250	$350	$450
§§92.551-92.595. Administrative Penalties	$400	$500	$600	$700

Figure: 40 TAC §97.602(h)(2)(D)

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.212	Prohibiting material alteration of a license.
§97.213(a)-(b) separate penalties	Agency relocation.
§97.214(a)-(b) separate penalties	Notification procedures for reporting a change in agency telephone number and agency operating hours.
§97.216(a)	Change in agency certification or accreditation status.
§97.217(b)(1)-(2) separate penalties	Procedures for notifying DADS of a voluntary suspension of operations.
§97.218(a)-(b) separate penalties	Notice of agency organizational changes and submitting criminal history check consent forms.
§97.219	Procedure for adding or deleting a category of service to the agency's license.
§97.220(a)(2)	Providing services only within an agency's licensed service area.
§97.220(c)	Providing a written notification of an expansion of an agency's licensed service area.
§97.220(d)	Providing written notification of a reduction of an agency's licensed service area.
§97.242(a)-(b) separate penalties	Preparing and maintaining a current written description of the agency's organizational structure.
§97.243(b)(1)(A)-(B) and (D)-(G) separate penalties	Responsibilities of the administrator.
§97.243(b)(3)	Requirement that the administrator designate in writing an agency employee who must provide DADS surveyors entry to the agency.
§97.243(d)	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(b)(1)-(5) separate penalties	Conditions of the agency administrator and alternate administrator.
§97.245(a)-(b)(1)-(10) separate penalties	Adoption and enforcement of written policies governing all personnel staffed by the agency.
§97.246(a)(1)-(4) and (b) separate penalties	An agency's personnel records and content of such records.
§97.247(a)(5), (b)(5), and (c)(5) separate penalties	Providing unlicensed staff with written information about the employee misconduct registry.
§97.247(d)	Documentation of compliance with verifying the employability and use of unlicensed staff.
§97.248(a)-(b)(1)-(4) separate penalties	The use of volunteers in an agency.
§97.249(b)	Adoption of a written policy for the reporting of alleged acts of abuse, neglect, and exploitation of clients.
§97.250(a)	Adoption of a written policy covering procedures for investigating known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.250(e)	Prohibiting an agency from retaliating against a person for filing a complaint, presenting a grievance, or providing, in good faith, information about the services provided by the agency.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.251	Adoption of a written policy for ensuring that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.253	Adoption of a written policy describing whether an agency will conduct drug testing of employees that describes the method and provides a copy of the policy.
§97.254	Adoption of a written policy for ensuring that the agency submits accurate billings and insurance claims.
§97.255	Adoption of a written policy for prohibition of illegal remuneration for securing or soliciting clients or patronage.
§97.256	Development and documentation of a written emergency preparedness and response plan.
§97.256(1)(A)-(M) separate penalties	Developing, maintaining and implementing a written emergency preparedness and response plan.
§97.259(g)	Prohibiting use of the presurvey conference to meet initial training requirements for a first-time administrator and alternate administrator.
§97.260(d)	Prohibiting use of the pre-survey conference to meeting continuing education requirements for an administrator and alternate administrator.
§97.281(1)-(16) separate penalties	Adoption of a written policy that specifies the agency's client care practices.
§97.282(a)-(b), (d)-(f)(1)-(8), and (g)-(h) separate penalties	Adoption of a written policy governing client conduct and responsibility and client rights.
§97.284	Adoption of a written policy for complying with the Clinical Laboratory Improvement Amendments of 1988, 42 USC, §263a, Certification of Laboratories (CLIA 1988).
§97.285	Adoption of written policies addressing infection control.
§97.285(1)(A)-(C) and (2) separate penalties	Adoption and compliance with a written policy that addresses infection control.
§97.286(a)	Adoption of a written policy for safe handling and disposal of biohazardous waste and materials, if applicable.
§97.288(a)	Adoption of a written policy that all service providers involved in the care of a client effectively coordinate the client's care.
§97.290(a)	Adoption of a written policy for ensuring that backup services are available when an agency employee or contractor is not available to deliver the services.
§97.290(a)(1)-(2)	Documentation that a client's designee agreed to provide backup services.
§97.290(a)(3)	Not coercing a client to accept backup services.
§97.290(b)	Adoption of a written policy for ensuring that clients are educated in how to access care from the agency or another health care provider after regular business hours.
§97.291	Adoption of a written policy for an agency's written contingency plan.
§97.292(a)	Providing a client or a client's family with a written agreement for services and ensuring appropriate content of the agreement.
§97.292(b)	Obtaining acknowledgment that the client received an appropriate written agreement for services and ensuring that the acknowledgment is in the client's record.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.293	Maintaining a current list of clients for each category of service licensed.
§97.294	Adoption of a written policy for establishing a time frame for the initiation of care or services.
§97.295(c), (d), and (f) separate penalties	Delivery of written notice and documentation requirements pertaining to an agency's transfer or discharge of a client.
§97.296(a)	Adoption of a written policy that states whether physician delegation will be honored by the agency.
§97.296(b)	Information the agency must receive to accept physician delegation.
§97.297	Adoption of a written policy describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.297(2)	Physician orders received by facsimile.
§97.298	Adoption of a written policy for ensuring compliance with rules adopted by the Texas Board of Nursing in 22 TAC Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.299	Adoption of a written policy for ensuring compliance with rules of the Texas Board of Nursing adopted at 22 TAC Chapters 211-226 (Nursing Continuing Education, Licensure, and Practice in the State of Texas).
§97.300(b)	Adoption of a written policy for maintaining a current medication list and a current medication administration record.
§97.300(b)(2)(A)-(B) separate penalties	The administration of medication.
§97.301(a)(1)-(9)(A)-(P) separate penalties	Requirements for maintaining an agency's client records.
§97.301(b)(1)-(3) separate penalties	Adoption and enforcement of a written policy for retention of records.
§97.302	Adoption of a written policy for pronouncement of death if that function is carried out by an agency registered nurse.
§97.321(a)	Branch office compliance with the regulations of its parent agency.
§97.321(c)(1)	Providing services only within a branch office licensed service area.
§97.321(c)(3)	Providing a written notification of an expansion of a branch office service area.
§97.321(c)(4)	Providing written notification of a reduction of a branch office licensed service area.
§97.321(d)(1)-(3) separate penalties	Requirements for branch offices.
§97.321(f)	Requirement prohibiting branch offices from providing services not offered by the parent agency.
§97.322(a)	Alternate delivery site compliance with hospice services standards.
§97.322(b)	An alternate delivery site's independent compliance with §97.403(c), (f)(1), (i) and §97.301 of this chapter.
§97.322(c)(1)	Providing services only within an alternate delivery site licensed service area.
§97.322(c)(3)	Providing a written notification of an expansion of an alternate delivery site service area.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.322(c)(4)	Providing written notification of a reduction of an alternate delivery site licensed service area.
§97.322(d)(1)-(3) separate penalties	Requirements for hospices and alternate delivery sites.
§97.401(f)	The use of home health aides.
§97.402(b)	Requirement for implementing a home health aide training and competency program.
§97.403(b)	Restriction on use of the word "hospice" in a title or description of a facility, organization, program, service provider, or services without a license.
§97.403(c)	Adoption of a written policy for the provision of hospice services.
§97.403(e)(3)	Designating which among multiple interdisciplinary teams is responsible for establishing the policies governing day-to-day hospice functions.
§97.403(f)(4)	Retaining responsibility for payment for services.
§97.403(j)	Requirement that reassessment of a client must not reduce core services.
§97.403(k)	Informing the client of the availability of short-term inpatient care.
§97.403(l)	Making and documenting efforts to arrange for visits of clergy and other members of spiritual and religious organizations.
§97.403(u)(4)	Specifying the persons authorized to administer medications in the client's plan of care.
§97.403(w)(2)(A)-(G) separate penalties	Development and documentation of a written emergency preparedness and response plan for a freestanding hospice in the event of a disaster.
§97.403(w)(5)-(6) and (8) separate penalties	Physical plant requirements in a freestanding hospice that provides inpatient care.
§97.403(w)(11)(A)-(D) separate penalties	Providing and supervising meal service in a freestanding hospice that provides inpatient care.
§97.404(e)	Requirement that an agency develops operational policies that are considerate of the principles of individual and family choice and control, functional need, and accessible and flexible services.
§97.404(f)(1)-(3) separate penalties	Additional requirements for maintaining client records in an agency that provides personal assistance services.
§97.404(g)	Adoption of a written policy that addresses the supervision of agency personnel with input from the client or family on the frequency of supervision.
§97.404(g)(1)-(2) separate penalties	Conditions and qualifications for supervision of agency personnel delivering personal assistance services.
§97.405(d)	Requirement for individual personnel files on all physicians.
§97.405(g)	A written transfer agreement with a local hospital for an agency that provides home dialysis services.
§97.405(h)	An agreement with a licensed end stage renal disease facility to provide backup outpatient dialysis services.
§97.405(j)	Ensuring that names of clients awaiting a donor transplant are entered in the recipient registry program.
§97.405(s)(1) and (4)-(7) separate penalties	Additional requirements for maintaining client records in an agency that provides home dialysis services.
§97.405(v)	Development of a written preventive maintenance program for home dialysis equipment.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.405(v)(1)(B)	Maintaining written evidence of preventive maintenance and equipment repairs.
§97.405(z)	Adoption of policies and procedures for medical emergencies and emergencies resulting from a disaster required of an agency that provides home dialysis services.
§97.406(1)	Adoption of a written policy for the provision of psychoactive treatments, if applicable.
§97.521(a)	Requirement for initiation of services for receiving an initial license.
§97.523(a)	Staff availability for the initial survey.
§97.523(b)	Staff availability for survey other than the initial survey.
§97.523(e)	Providing surveyor entry to the agency during regular business hours and within two hours of the surveyor's arrival at the agency.
§97.525(c)	Having documentation of accreditation available at the time of a survey.
§97.527(b)	Providing surveyor with audio recording of the exit conference if made by the agency.
§97.527(c)	Providing surveyor with video recording of the exit conference if made by the agency.
§97.527(g)(1)-(2)(A)-(D)	Submitting an acceptable plan of correction and correcting a violation within the required time frame.

Figure: 40 TAC §97.602(h)(3)(E)

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.11(d)	Requirement to have a separate license for each place of business.
§97.23	A license may not be sold or assigned to another person.
§97.220(b)	Maintaining adequate staff to provide services and supervise the provision of services within the service area.
§97.241(a), (c), and (d) separate penalties	Management responsibilities.
§97.243(a)(1)	Designating a qualified agency administrator.
§97.243(a)(2)	Designating a qualified agency alternate administrator.
§97.243(b)(1)(A)-(F) and (2)-(3) separate penalties	Responsibilities of an agency administrator.
§97.243(c)(1)	Requirement to directly employ or contract with a qualified individual to serve as the supervising nurse.
§97.243(c)(2)	Requirement to designate a qualified alternate supervising nurse.
§97.243(c)(2)(A)(i)-(iv) separate penalties	Supervisory responsibilities of the supervising nurse or alternate supervising nurse.
§97.243(c)(2)(B)	Allowing the supervising nurse to be the administrator if the supervising nurse meets the qualifications of the administrator.
§97.243(c)(3)	Requirements for the supervision of physical, occupational, speech, or respiratory therapy; medical social services; or nutritional counseling.
§97.243(d)	Enforcing a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)	Qualifications of the agency administrator and alternate administrator for agencies licensed to provide licensed home health services, licensed and certified home health services or hospice services.
§97.244(a)(2)	Qualifications of the agency administrator and alternate administrator for agencies licensed to provide only personal assistance services.
§97.244(b)(1)-(5) separate penalties	Conditions of the agency administrator and alternate administrator.
§97.244(c)(1)	Qualifications of the supervising nurse and alternate supervising nurse for agencies without the home dialysis designation.
§97.244(c)(2)	Qualifications of the supervising nurse and alternate supervising nurse for agencies with the home dialysis designation.
§97.245(a)-(b)(1)-(10) separate penalties	Enforcement of staffing policies that govern all personnel used by the agency.
§97.247(a)(1)-(4) and (6); (b)(1)-(4) and (6); (c)(1)-(4) and (6) separate penalties	Employability and use of unlicensed persons.
§97.249(c)	Reporting alleged acts of abuse, neglect, and exploitation of clients.
§97.250(b)(1)-(3), (c)(1)-(2), and (d)-(e) separate penalties	Enforcement of an agency's written policy for investigation of known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.251	Compliance with the agency's written policy to ensure that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(1)-(2)	An agency's financial ability to carry out its functions.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.256(1)(A)-(M) and (2) separate penalties	Developing, maintaining and implementing a written emergency preparedness and response plan.
§97.256(4) and (5)(A)-(B) separate penalties	Compliance with rules related to written records and notice of temporary changes due to an emergency or disaster.
§97.259(b)-(e) separate penalties	Initial educational training requirements for a first-time agency administrator and alternate administrator.
§97.259(f)	Documentation requirements for initial educational training of a first-time administrator and alternate administrator.
§97.260(a)	Annual continuing education requirements for an agency administrator and alternate administrator.
§97.260(b)	Continuing education requirements for an agency administrator and alternate administrator who has not served for 180 days or more immediately preceding the date of designation.
§97.260(c)	Documentation requirements for continuing education of an administrator and alternate administrator.
§97.281(1)-(16) separate penalties	Enforcement of a written policy for client care practices.
§97.282(a)-(f)(1)-(8) and (g)-(h) separate penalties	Compliance with an agency policy on client conduct and responsibility and client rights.
§97.284	Compliance with the Clinical Laboratory Improvement Amendments of 1988.
§97.285	Compliance with written policies addressing infection control.
§97.285(1)(A)-(C) and (2) separate penalties	Enforcement and compliance with written policies on infection control.
§97.286(b)	Compliance with 25 TAC §§1.131-1.137 concerning the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities.
§97.287(a)(1)-(3) and (b)-(c) separate penalties	An agency's Quality Assessment and Performance Improvement Program.
§97.288(a)-(b) separate penalties	Compliance with an agency's written policy for coordination of services and documentation requirements.
§97.289(a)-(b) separate penalties	An agency's use of and agreement with independent contractors and arranged services.
§97.290(a)	Enforcing a written policy that backup services are available when needed.
§97.290(a)(1)-(2)	Documentation that a client's designee agreed to provide backup services.
§97.290(b)	Enforcing a written policy that clients are educated in how to access care after hours.
§97.291(1)-(2) separate penalties	Implementing a written policy for an agency's written contingency plan.
§97.292(a)	Complying with the terms of a written agreement for services that the agency provided to a client or a client's family.
§97.295(a)(1)-(2) separate penalties	Providing a client with written notification, and notifying a client's attending physician if applicable, of transfer or discharge.
§97.295(b)	An agency providing written notification of a client's transfer or discharge within the required time frame.
§97.296(a)	Enforcement of an agency's policy regarding acceptance of physician delegation orders.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.296(b)	Information the agency must receive to accept physician delegation.
§97.297	Enforcement of a written policy describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.297(1)	Countersignature of physician verbal orders.
§97.298	Enforcement of a written policy for ensuring compliance with the rules adopted by the Texas Board of Nursing in 22 TAC Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.300(b)	Enforcement of a written policy for maintaining a current medication list and a current medication administration record.
§97.300(b)(1)-(2)(A)-(B) and (3) separate penalties	The administration of medication.
§97.303(1)-(3)(A)-(F) separate penalties	The possession and use of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.321(c)(2)	Maintaining adequate staff to provide and supervise services at a branch office.
§97.322(c)(2)	Maintaining adequate staff to provide and supervise services at an alternate delivery site.
§97.401(b)(1)-(2)(A)-B) separate penalties	Acceptance of a client for home health services and the initiation of services.
§97.401(d)	Requirement that qualified personnel provide and supervise all services.
§97.401(e)	Requirement that all staff providing services, delegation, and supervision be employed by or be under contract with the agency.
§97.401(g)	Age and competency of unlicensed persons providing licensed home health services.
§97.402(a)	Compliance with the Medicare Conditions of Participation (Social Security Act, Title 42, Code of Federal Regulations, Part 484).
§97.402(c)-(e) separate penalties	Compliance with §97.701(f) of this chapter (relating to Home Health Aides) for an agency that implements a competency evaluation program.
§97.403(a)	Compliance with the Social Security Act and the regulations in Title 42, Code of Federal Regulations, Part 418.
§97.403(c)	Enforcement of a written policy for the provision of hospice services.
§97.403(d)(1)-(3) separate penalties	Requirement and conditions of the medical director for an agency that provides hospice services.
§97.403(e)(1)(A)-(D) separate penalties	Composition of an interdisciplinary team or teams.
§97.403(e)(2)(A)-(D) separate penalties	Responsibilities of the interdisciplinary team.
§97.403(e)(4)	Designating a registered nurse to coordinate implementation of the plan of care for each client.
§97.403(f)(1)	Ensuring continuity of client and family care in home and outpatient and inpatient settings.
§97.403(f)(2)	Contract requirements for providing arranged services.
§97.403(f)(3)	Professional management responsibility for arranged services.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(f)(5)	Ensuring that inpatient care is furnished only in a licensed facility and according to contract requirements.
§97.403(g)(1)-(3) separate penalties	Time requirements for contacting the client or client's representative, performing the initial health assessment visit, and initiation of services.
§97.403(h)	Performing and making available to each client a comprehensive health assessment that identifies the client's needs.
§97.403(h)(1)	Completing the comprehensive health assessment in a timely manner.
§97.403(h)(2)(A)-(C) separate penalties	Composition of the comprehensive health assessment.
§97.403(h)(3)(A)-(B) separate penalties	Requirement for updating and revising the comprehensive health assessment.
§97.403(i)(1)-(3) separate penalties	Requirements for a written plan of care.
§97.403(m)	Ensuring that all core services are provided, and requirements for using contracted staff, if necessary.
§97.403(n)(1)-(3) separate penalties	Requirements for providing nursing care and services.
§97.403(o)	Qualifications of the social worker performing hospice services.
§97.403(p)	Requirements for ensuring that general medical needs of clients are met.
§97.403(q)(1)-(4) separate penalties	Requirements for providing counseling services.
§97.403(r)	Requirements for providing services, maintaining a system for ensuring identification of client needs, communication across all disciplines, and integration of services.
§97.403(s)	Requirements for having therapy services available.
§97.403(t)	Requirements for having home health aide and homemaker services available.
§97.403(t)(1)-(2) separate penalties	Requirements for RN supervisory visits to assess aide services.
§97.403(u)(1)-(3) separate penalties	Requirements for providing medical supplies, appliances, and medications, as needed, for palliation and management of terminal illness and related conditions.
§97.403(v)	Requirements that inpatient care be available for pain control, symptom management, and respite.
§97.403(v)(1)	Requirements for providing inpatient care.
§97.403(v)(2)(A)-(B) separate penalties	Requirements for a quality assessment and performance improvement plan for hospice services.
§97.403(w)(1)(A)-(B) separate penalties	Requirements for having on-site 24-hour nursing services provided by RNs and LVNs.
§97.403(w)(2)(A)-(G) separate penalties	Implementation of a written disaster preparedness and response plan for a freestanding hospice in the event of a disaster.
§97.403(w)(3)	Meeting all federal, state, and local laws, regulations, and codes pertaining to health and safety.
§97.403(w)(4)	Meeting the National Fire Protection Association Life Safety Code for fire in buildings and structures.
§97.403(w)(9)	Having available at all times a quantity of linen essential for proper care of clients and requirements to prevent the spread of infection on linens.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(w)(10)	Making provisions for isolating clients with infectious diseases.
§97.403(w)(12)(A)-(I) separate penalties	Methods and procedures for dispensing and administering medications.
§97.404(c)	Qualifications of agency staff performing personal assistance services.
§97.404(d)	Tasks authorized under a personal assistance services license category.
§97.404(g)	Enforcement of a written policy that addresses the supervision of agency personnel with input from the client or family on the frequency of supervision.
§97.404(g)(1)-(2) separate penalties	Conditions and qualifications for supervising agency personnel delivering personal assistance services.
§97.404(h)(1)-(5) separate penalties	Performance of gastrostomy tube feedings and medication administration for an agency that provides personal assistance services.
§97.405(a)	Requirements for agencies that provide peritoneal dialysis or hemodialysis services.
§97.405(c)(1)-(2) separate penalties	Qualifications and responsibilities of the medical director for an agency that provides home dialysis services.
§97.405(e)(1)(A)-(C) separate penalties	Provision and supervision of nursing services for an agency that provides home dialysis services.
§97.405(e)(2)	Provision of nutritional counseling for an agency that provides home dialysis services.
§97.405(e)(3)	Provision of medical social services for an agency that provides home dialysis services.
§97.405(f)(1)	Requirements for orientation and training of personnel providing direct care to clients receiving home dialysis services.
§97.405(f)(2)(A)-(G) separate penalties	Requirement for an orientation and skills education period for licensed nurses.
§97.405(i)	Requirement that an agency coordinate the exchange of medical and other important information when transferring a home dialysis client to a health-care facility for treatment.
§97.405(k)	Requirement for routine hepatitis testing of home dialysis clients and agency employees providing dialysis care.
§97.405(k)(1)(A)-(C) separate penalties	Requirements for hepatitis B screening and vaccinations for staff.
§97.405(k)(2)(A)-(E) separate penalties	Requirements for hepatitis B screening and vaccinations for clients.
§97.405(l)	Requirements for employees providing direct care to clients to have a current CPR certification.
§97.405(m)	Requirement for initial admission assessment of a client for home dialysis services.
§97.405(n)	Requirement for development of a long-term program for a client receiving home dialysis services.
§97.405(o)	Requirement that the agency conducts a history and physical of a home dialysis client at admission and annually.
§97.405(p)(1)-(2) separate penalties	Requirement for physician orders for home self-assisted dialysis treatment.
§97.405(q)(1)-(7) separate penalties	Requirements for development and implementation of a care plan for a home dialysis client.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.405(r)	Requirement for medication administration by licensed personnel for an agency that provides home dialysis services.
§97.405(s)(2)-(3) separate penalties	Additional requirements for maintaining client records in an agency that provides home dialysis services.
§97.405(t)(1)-(4) separate penalties	Requirements for use of water in the home dialysis setting.
§97.405(u)	Adoption and enforcement of a policy to test dialysis equipment prior to each treatment.
§97.405(v)	Enforcing the agency's written preventive maintenance program for home dialysis equipment.
§97.405(v)(1), (1)(A), (1)(C)-(D), and (2) separate penalties	Implementing requirements for a written preventive maintenance program for home dialysis equipment.
§97.405(w)(1)-(6) separate penalties	Reuse of disposable medical devices in the home dialysis setting.
§97.405(x)(1)-(2)	Provision of laboratory services.
§97.405(x)(3)-(4) separate penalties	Provision of laboratory services.
§97.405(y)(1)-(2) separate penalties	Supplies for home dialysis services.
§97.405(z)(1)-(7) separate penalties	Compliance with policies and procedures for medical emergencies and emergencies resulting from a disaster required of an agency that provides home dialysis services.
§97.406(2)-(5) separate penalties	Provision of psychoactive services.
§97.407(1)-(11) separate penalties	Provision of intravenous therapy services.
§97.523(e)	Requirement to grant the surveyor entry to the agency if closed when the surveyor arrives during regular business hours.
§97.701(a)-(f)(1)-(7) separate penalties	Home health aides.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Texas Water Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed settlement of a lawsuit brought under the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *State of Texas v. Gerald Winnett and Winnet Oil Company,* Cause No. D-1-GV-04-004073; in the 353rd Judicial District Court, Travis County, Texas.

Nature of Defendants' Operations: Defendants owned and/or operated underground petroleum storage tanks ("PSTs") at facilities in Eastland and Callahan Counties. The State initiated the suit to enforce the terms of a TCEQ administrative order issued against the defendants on October 17, 2000. The parties reached agreement on an Agreed Final Judgment ("AFJ") on December 17, 2008.

Proposed Agreed Final Judgment: The parties now seek to file the AFJ for court approval, which requires Gerald Winnett to remove tanks at certain facilities and clean up releases from the tanks. The AFJ assesses $100,000 in civil penalties, unpaid administrative penalties, unpaid tank registration fees and attorney's fees against Gerald Winnett. The AFJ assesses in excess of $450,000 in civil penalties and unpaid administrative penalties against Winnett Oil Company.

For a complete description of the proposed settlement, the complete proposed Modified Agreed Final Judgment and Permanent Injunction should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Tom Bohl, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-200806663
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 22, 2008

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Texas Department of Agriculture

Request for Proposals: Urban Schools Grant Program

Pursuant to the Texas Agriculture Code, §§48.001 - 48.005 and the Texas Administrative Code, Title 4, Part 1, Chapter 1, §§1.800 - 1.804, the Texas Department of Agriculture (TDA) hereby requests proposals for agricultural projects designed to foster an understanding and awareness of agriculture in elementary and middle school students for the period of September 1, 2009, through August 31, 2010, from certain Texas urban school districts. A total amount of up to $2,500 may be awarded to an eligible elementary and middle school in a single grant cycle.

Eligibility. Proposals must be submitted by a Texas public elementary or middle school from an urban school district with an enrollment of at least 49,000 students. According to the Texas Education Agency's (TEA) October 2008 records, the eligible school districts are:

Aldine Independent School District;

Arlington Independent School District;

Austin Independent School District;

Cypress-Fairbanks Independent School District;

Dallas Independent School District;

El Paso Independent School District;

Fort Bend Independent School District;

Fort Worth Independent School District;

Garland Independent School District;

Houston Independent School District;

Katy Independent School District;

Lewisville Independent School District;

North East Independent School District;

Northside Independent School District;

Pasadena Independent School District;

Plano Independent School District; and

San Antonio Independent School District.

If your school district is not listed above and you feel it meets the minimum student enrollment of 49,000, you will need to attach TEA verification of enrollment to your application.

Proposal Requirements. Each proposal may not exceed six pages and must include the following:

1. A cover page with the project title, name of the school district and elementary or middle school, both the principal's and project coordinator's names along with their contact information (school address, email, telephone and fax numbers);

2. A detailed project description including the role of each grade level that will participate in the project;

3. A statement of the educational benefits of the project, including how the project will improve the students' understanding of agriculture;

4. A project budget including a detailed schedule of anticipated costs for the project.

Deadline and Submission Information. Proposals should be submitted to Lindsay Dickens, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. The street address is 1700 N. Congress Ave., 11th Floor, Austin, Texas 78701.

Proposals must be received no later than 5:00 p.m. on June 12, 2009. One original and ten copies must be submitted. Fax copies will not be accepted.

Please contact Lindsay Dickens at (512) 463-6695 or by email at grants@tda.state.tx.state.us with any questions you may have.

Proposal Evaluations. Proposals will be evaluated based on the requirements set forth above by a panel appointed by the Commissioner of the Texas Department of Agriculture. The panel shall review the proposals and make funding recommendations to the Commissioner. The panel shall consist of representatives from the following: the Texas Department of Agriculture, education industry, livestock industry, specialty crop industry, row crop industry, horticulture industry and the Texas AgriLife Extension Service.

Approved Projects. The announcement of the grant awards will be made by August, 2009. All approved projects will have a start date of September 1, 2009, and must be completed by August 31, 2010. Project Coordinators will be required to submit quarterly progress reports and budget reports. Upon completion of the project, a Final Compliance Report of the educational results of the project and photographs to document such results will be due within thirty (30) days. All awards will be subject to audit.

Reporting Requirements. Approved projects are required to submit the following reports:

1. Project Progress Reports. These reports are due on a quarterly basis from one to three pages in length detailing accomplishment of project objectives for the time periods specified in the award document.

2. Final Compliance Report due either thirty (30) days after completion of the project or upon termination of the contract. The final report shall be submitted in a hard copy format and an electronic format should be emailed to the department. The final report shall contain:

a. A project summary-history of the project, its objectives, importance, effort, results, and commercial applications of the project;

b. A description of the successes, challenges, and any limitations of the program; and

c. A description of future plans, including how the project will continue after the grant is expended and how additional funding might address expansion efforts; and

d. Photographs to document results.

3. Project Budget Reports. Budget reports are due on a quarterly basis for the time periods specified in the award document that details the grant award spent to date.

4. Final Budget report is due thirty (30) days after the completion of the project or the termination of the contract.

General Compliance Information. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature.

Any information or documentation submitted to TDA is subject to disclosure under the Texas Public Information Act.

Awarded grant projects must remain in full compliance with state and federal laws and regulations or be subject to termination at the discretion of TDA.

Upon grant award, TDA and the Texas State Auditor's Office shall have access to and the right to examine all books, accounts, records, files and other papers or property belonging to or in use by the grantee and pertaining to the grant award. Additionally, these records must remain available and accessible no less than three (3) years after the termination of the grant project.

If the Grantee has a financial audit performed in any year during which Grantee receives funds from Grantor, and if the Grantor requests information about the audit, the Grantee shall provide such information to TDA or provide information as to where the audit report can be publicly viewed, including the audit transmittal letter, management letter, and any schedules in which the Grantee's funds are included.

In accordance with Texas Government Code Ann., §783.007, grant awards shall comply in all respects with the Uniform Grant Management Standards (UGMS). Upon grant award, grantees can be provided a copy or it may be downloaded from http://www.governor.state.tx.us/divisions/stategrants/guidelines/files/UGMS062004.doc.

Texas Public Information Act. All proposals shall be deemed, once submitted, to be the property of the TDA and are subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

TRD-200806650
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: December 19, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/29/08 - 01/04/09 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/29/08 - 01/04/09 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200806676
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 23, 2008

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East Texas Council of Governments

Request for Proposal for Vehicle Fleet Maintenance

The East Texas Council of Governments (ETCOG) Rural Transit District is seeking proposals for Vehicle Fleet Maintenance for a fleet of 43 vehicles. The request for proposals (RFP) is available to view online at www.etcog.org. Requests for clarification are due January 24, 2009 at 4:00 p.m. CDT at ETCOG located at 3800 Stone Road, Kilgore, Texas 75662. Applications are due to ETCOG on February 27, 2009 at 4:00 p.m. CDT.

TRD-200806701

David A. Cleveland
Executive Director
East Texas Council of Governments
Filed: December 29, 2008

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Texas Commission on Environmental Quality

Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 9, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 9, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Accord Construction, Inc.; DOCKET NUMBER: 2007-1420-AIR-E; TCEQ ID NUMBER: RN105227037; LOCATION: 410 West Trinity Boulevard, Grand Prairie, Dallas County; TYPE OF FACILITY: portable rock crusher; RULES VIOLATED: Texas Health and Safety Code (THSC), §382.0518(a) and §382.085(b) and 30 TAC §116.110(a)(1), by failing to obtain authorization prior to constructing and operating a portable rock crusher; PENALTY: $30,000, Supplemental Environmental Project (SEP) offset amount of $15,000 applied to Texas Congress of Parents and Teachers Association (PTA) - Texas PTA Clean School Bus Program; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Buddy Ford; DOCKET NUMBER: 2006-0504-PST-E; TCEQ ID NUMBER: RN102063088; LOCATION: 300 West Pinecrest Drive, Marshall, Harrison County; TYPE OF FACILITY: auto repair and gas station business; RULES VIOLATED: 30 TAC §334.8(c)(5)(B)(ii), by failing to renew a delivery certificate by submitting a new underground storage tank (UST) registration and self-certification form 30 days before the expiration of the delivery certificate in question; 30 TAC §334.50(a)(1)(A), (b)(2)(A)(i)(III), and (d)(1)(B)(ii), and Texas Water Code (TWC), §26.3475(a) and (c)(1), by failing to provide a release detection method capable of detecting a release from any portion of the UST system which contains regulated substances including the tanks, piping, and other underground ancillary equipment, failing to reconcile inventory control records on a monthly basis, which are sufficiently accurate to detect a release which equals or exceeds the sum of 1% of flow-through for the month plus 130 gallons, and by failing to test the line leak detector at least once per year for performance and reliability; 30 TAC §334.45(c)(3)(A), by failing to install a securely anchored emergency shut-off valve (shear or impact valve) in east pressurized product line; and 30 TAC §334.10(b), by failing to comply with general record keeping requirements for owners and operators of UST systems; PENALTY: $5,704; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(3) COMPANY: Churches Hill Grocery, Inc. dba Jiffy Mart 6; DOCKET NUMBER: 2008-0189-PST-E; TCEQ ID NUMBER: RN101434165; LOCATION: 2850 East University Avenue, Georgetown, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.51(b)(2)(C), and TWC, §26.3475(c)(2), by failing to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches no higher than 95% capacity; 30 TAC §334.50(b)(1)(A) and (d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to ensure that the USTs are monitored in a manner which will detect a release at a frequency of at least once every month and by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number was permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST according to the UST registration and self-certification form; and 30 TAC §115.222(3) and (6) and THSC, §382.085(b), by failing to comply with the control requirements for emission limitations, as detected by sight, sound, or smell, anywhere in the liquid transfer or vapor balance system; PENALTY: $9,375; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: City of Big Wells; DOCKET NUMBER: 2008-1160-MWD-E; TCEQ ID NUMBER: RN101720357; LOCATION: 2,000 feet west of Farm-to-Market Road 1867 and 2,200 feet south of United States Highway 85, Big Wells, Dimmitt County; TYPE OF FACILITY: domestic wastewater system; RULES VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13782001 Effluent Limitations and Monitoring Requirements Numbers 1, 3, and 6, TWC, §26.121(a), by failing to meet the five-day biochemical oxygen demand, dissolved oxygen, total suspended solids, and pH effluent limitations; 30 TAC §305.125(17) and TPDES Permit Number 13782001, Monitoring and Reporting Requirements Number 1, by failing to submit timely Discharge Monitoring Reports for the monitoring periods ending February and August 2004; and 30 TAC §305.125(1) and (17) and TPDES Permit Number 13782001, Sludge Provisions, by failing to submit the annual sludge reports for the years 2005 and 2006 to the commission by September 1 of each year; PENALTY: $11,950; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Laredo Regional Office,

707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(5) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2007-0372-AIR-E; TCEQ ID NUMBER: RN102574803; LOCATION: 5000 Bayway Drive, Baytown, Harris County; TYPE OF FACILITY: chemical plant; RULES VIOLATED: 30 TAC §116.115(c) and §122.143(4), 40 Code of Federal Regulations (CFR) §§61.349(a)(2)(iii), 63.11(b)(6)(ii), and 63.113(a)(1)(i), THSC, §382.085(b), Permit Number 4600, Special Condition Number 3A, and Permit Number O-1278, Special Condition Numbers 1A and 17, by failing to maintain the minimum net heating value of 300 British thermal units per cubic foot at standard operating conditions (Btu/scf) in the gas stream to Flare 24 for a total of 2,114 hours from February 1 - October 26, 2006; 30 TAC §115.146(2) and §122.143(4), 40 CFR §63.147(b)(1), THSC, §382.085(b), and Permit Number O-1278, Special Condition Number 1A, by failing to maintain complete records of semiannual visual inspections of individual drain systems; 30 TAC §116.115(c) and §122.143(4), 40 CFR §63.151(j)(2), THSC, §382.085(b), Permit Number 20211, Special Condition Numbers 3-5, and Permit Number O-1278, Special Condition Numbers 1A and 17, by failing to submit an updated Notice of Complaints for the BHU T-150 Steam Stripper within 180 days after the change in the established operating range was made; and 30 TAC §116.115(c) and §122.143(4), 40 CFR §63.146(d)(2), THSC, §382.085(b), Permit Number 20211, Special Condition Numbers 3-5, and Permit Number O-1278, Special Condition Numbers 1A and 17, by failing to report excursions which occurred on the column overhead temperature of the BHU T-150 Steam Stripper in periodic reports dated December 15, 2004 - February 25, 2005; PENALTY: $22,016; STAFF ATTORNEY: Alfred Oloko, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Veolia es Technical Solutions, L.L.C.; DOCKET NUMBER: 2008-0270-IHW-E; TCEQ ID NUMBER: RN102599719; LOCATION: 7665 Highway 73, Port Arthur, Jefferson County; TYPE OF FACILITY: industrial hazardous waste management facility; RULES VIOLATED: 30 TAC §305.125(1) and §335.2(a) and (b), 40 CFR §264.344(a), and Permit Number HW-50212, Section IV.B.3.c, by failing to obtain authorization for the incineration and/or processing of hazardous waste not specified in their permit; and 30 TAC §335.2(a), by failing to prevent the unauthorized discharge of industrial solid waste; PENALTY: $6,090; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

TRD-200806688
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 23, 2008

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 9, 2009**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 9, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Catherine E. Harris dba All Water Austin; DOCKET NUMBER: 2007-1534-LII-E; TCEQ ID NUMBER: RN103669073; LOCATION: 505 East 8th Street, Georgetown, Williamson County; TYPE OF FACILITY: landscape irrigation service business; RULES VIOLATED: 30 TAC §344.70, by failing to comply with reasonable inspection requirements, ordinances, or regulations designed to protect the public water supply of a city, town, county, special purpose district or other political subdivision of the State; 30 TAC §344.77(e)(1), by failing to meet the minimum standards for depth coverage of piping for the installation of irrigation systems; 30 TAC §344.77(f)(3), by failing to meet the minimum standards for wiring irrigation systems; 30 TAC §344.93(c), by failing to refrain from false, misleading, or deceptive practices relating to bidding, advertising or services and fees; 30 TAC §344.96, by failing to honor the warranty presented to the customers for the materials and labor furnished in the installation of the new irrigation systems; PENALTY: $2,337; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(2) COMPANY: Danny J. Shipman, Jr. dba Kim's Septic Service; DOCKET NUMBER: 2008-0912-SLG-E; TCEQ ID NUMBER: RN105124341; LOCATION: bar ditch along Farm-to-Market Road 3003, Graham, Young County; TYPE OF FACILITY: registered septic sludge transporter business; RULES VIOLATED: TWC, §26.121(a)(1) and 30 TAC §312.143, by failing to prevent the unauthorized discharge of approximately 350 gallons of septic tank waste; PENALTY: $1,530; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(3) COMPANY: E. I. Du Pont De Nemours and Company; DOCKET NUMBER: 2007-1531-AIR-E; TCEQ ID NUMBER: RN100225085; LOCATION: 12501 Strang Road, La Porte, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED:

Air Permit Number 4445, Special Condition Number 1, 30 TAC §116.115(c), and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions during a February 19, 2006, emissions event; Federal Operating Permit Number O-01911, Special Condition Numbers 1.A. and 15, Air Permit Number 4445, Special Condition Number 5.A, 40 Code of Federal Regulations (CFR) §§60.482-10(d), 63.11(b)(6)(i)(B)(ii), 63.113(a)(1)(i), and 60.18(c)(3)(i)(B)(ii), 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to maintain the net heating value of the gas being combusted by Flare VS-202C at 300 British thermal unit/standard cubic feet (Btu/scf) or greater; and Federal Operating Permit Number O-01911, and Special Condition Numbers 1.A. and 15, Air Permit Number 4445, Special Condition Number 6, 40 CFR §60.120(d)(5), 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to maintain the liquid flow rate to Tank Farm Super Scrubber VD-206 above 17 gallons per minute (gpm); PENALTY: $28,825; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division; MC 175, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: James Lindgren dba Tow King, Inc.; DOCKET NUMBER: 2008-0828-MSW-E; TCEQ ID NUMBER: RN105298228; LOCATION: 7191 Bagby Avenue, Waco, McLennan County; TYPE OF FACILITY: towing company; RULES VIOLATED: 30 TAC §327.5(c), by failing to submit a written report describing the details of a spill and supporting the adequacy of the response action to the Waco Regional Office within 30 working days of the accident; PENALTY: $1,050; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Jorge A. Cavazos; DOCKET NUMBER: 2007-0391-LII-E; TCEQ ID NUMBER: RN103331591; LOCATION: 1795 Williams Street, Eagle Pass, Maverick County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to obtain an irrigator license from the commission prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system; PENALTY: $2,500; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(6) COMPANY: Rolando Rodriguez and Josefina Rodriguez; DOCKET NUMBER: 2008-0932-MLM-E; TCEQ ID NUMBER: RN10501969; LOCATION: 110 Little America Lane, Los Fresnos, Cameron County; TYPE OF FACILITY: unauthorized disposal site; RULES VIOLATED: 30 TAC §330.15(c) and TWC, §26.121(a)(1), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,000; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(7) COMPANY: Stanley Burse; DOCKET NUMBER: 2007-1831-LII-E; TCEQ ID NUMBER: RN105068274; LOCATION: 1002 Ogden, Austin, Travis County and 2716 Little Elm Trail, Cedar Park, Williamson County; TYPE OF FACILITY: landscape irrigator business (2716 Little Elm Trail) and 1002 Ogden, Austin, Travis County (irrigation system); RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system and representing to the public that he could perform a service for which a license is required; PENALTY: $594; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(8) COMPANY: Tajrangeza Khail dba Benny's Food Mart and Aiedeh Husainat dba Benny's Food Mart; DOCKET NUMBER: 2006-0169-PST-E; TCEQ ID NUMBER: RN101866002; LOCATION: 1304 Spurlock Road, Nederland, Jefferson County; TYPE OF FACILITY: formerly operated as a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.47(a)(2) and §334.54(b) and (d)(2), by failing to permanently remove from service underground storage tanks (UST) components that are not in compliance with 30 TAC §334.55; and 30 TAC §334.47(d)(3), by failing to amend, update, or change petroleum storage tank (PST) registration information; PENALTY: $8,925; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(9) COMPANY: Wafia Hanif dba Tigerland Express 1 f/k/a Wafia Hanif dba Super Stop Texaco; DOCKET NUMBER: 2007-2009-PST-E; TCEQ ID NUMBER: RN104661384; LOCATION: 401 East Lennon Drive, Emory, Rains County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(4), TWC, §26.3475(d), and TCEQ Agreed Order, Docket Number 2005-1573-PST-E, Ordering Provision Number 2.a.i., by failing to have the corrosion protection equipment tested for operability and adequacy of protection at least once every three years to ensure adequate protection of the UST system; 30 TAC §334.49(c)(2)(C), TWC, §26.3475(d), and TCEQ Agreed Order, Docket Number 2005-1573-PST-E, Ordering Provision Number 2.a.i., by failing to inspect the cathodic protection system at least once every 60 days to ensure the rectifier and other system components were operating properly; 30 TAC §334.50(b)(1)(A), TWC, §26.3475(c)(1), and TCEQ Agreed Order, Docket Number 2005-1573-PST-E, Ordering Provision Number 2.a.iii., by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.48(c) and TCEQ Agreed Order, Docket Number 2005-1573-PST-E, Ordering Provision Number 2.a.ii., by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum used as a motor fuel; and 30 TAC §334.45(c)(3)(A) and TCEQ Agreed Order, Docket Number 2005-1573-PST-E, Ordering Provision Number 2.a.iv., by failing to properly install and maintain a secure anchor at the base of each Underwriters Laboratories (UL)-listed emergency shutoff valve in a piping system in which regulated substances are conveyed under pressure to an aboveground dispensing unit; PENALTY: $70,870; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-200806689
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 23, 2008

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Notice of Opportunity to Comment on Shut Down/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the

listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 9, 2009**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 9, 2009**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Bountheung Noymany dba Boat Club Grocery; DOCKET NUMBER: 2006-0490-PST-E; TCEQ ID NUMBER: RN100737493; LOCATION: 5300 Boat Club Road, Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(4), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to ensure that all tanks are monitored in a manner which will detect a release at a frequency of at least once every month; TWC §26.3475(a) and 30 TAC §334.50(b)(2), by failing to conduct proper release detection for the product piping associated with the underground storage tank (UST) system; TWC, §26.3475(a) and 30 TAC §334.50(b)(2)(A)(i)(III), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.48(c), by failing to conduct inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel each operating day, and 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a delivery certificate by timely and proper submission of a new UST registration and self-certification form to the agency at least 30 days before the expiration date of the delivery certificate; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: $21,000; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Oscar Food Corporation dba Circle A Store; DOCKET NUMBER: 2006-1855-PST-E; TCEQ ID NUMBER: RN102409034; LOCATION: 14525 Woodforest Boulevard., Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.10(b), by failing to maintain and make available legible copies of all required UST records for inspection upon request by agency personnel; Texas Health and Safety Code (THSC), §382.085(b) and 30 TAC § 115.246(1), (3) - (6), and (7)(A), by failing to maintain Stage II records on-site at the station ordinarily manned during business hours, and make immediately available for review upon request; THSC, §382.085(b) and 30 TAC §115.242(3), (3)(A), (3)(B), and (9), by failing to maintain all components of the Stage II vapor recovery system in proper operating condition as specified by the manufacture and/or any applicable California Air Resource Board Executive Order(s), and free of defects that would impair the effectiveness of the system; THSC, §382.085(b) and 30 TAC §115.244(3), by failing to conduct monthly inspections of the Stage II vapor recovery system; TWC, §26.3475(c)(2) and 30 TAC§334.51(b)(1)(B), by failing to provide overfill prevention equipment for the UST system; TWC, §26.3475(d) and 30 TAC §334.49(c)(2)(C), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly; TWC, §26.3475(a) and (c)(1), and 30 TAC §334.50(b)(1)(A), (2)(A)(i)(III), (2)(A)(ii), and (d)(4)(A)(ii)(II), by failing to monitor USTs for releases at a frequency of at least once every month; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; PENALTY: $16,770; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200806687
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 23, 2008

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Harlingen	Rio Grande Valley Isotopes LLC	L06202	Harlingen	00	12/09/08

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Heart Hospital IV L.P. dba Heart Hospital of Austin	L05215	Austin	31	11/25/08
Austin	Austin Radiological Association	L00545	Austin	150	12/05/08
Austin	St. Davids Healthcare Partnership L.L.P. dba North Austin Medical Center	L04910	Austin	81	12/05/08
Austin	Central Texas Veterinary Specialty Hospital	L06022	Austin	01	12/03/08
Austin	ARA Imaging	L05862	Austin	41	12/02/08
Baytown	San Jacinto Methodist Hospital	L02388	Baytown	57	11/25/08
Beaumont	Baptist Hospital of Southeast Texas	L00358	Beaumont	114	11/26/08
Corpus Christi	The Corpus Christi Medical Center Bay Area	L04723	Corpus Christi	49	12/01/08
Corpus Christi	Radiology Association L.L.P.	L04169	Corpus Christi	47	12/11/08
Dallas	Methodist Hospitals of Dallas Radiology Svcs.	L00659	Dallas	59	11/24/08
Dallas	Cardinal Health	L02048	Dallas	129	11/25/08
Dallas	Immuno Diagnostic Center Inc.	L04365	Dallas	10	11/21/08
Dallas	Cooper Medical Imaging L.L.P.	L05138	Dallas	11	12/03/08
Dallas	The Center for Molecular Imaging L.P. dba Southwest Diagnostic Center for Molecular Imaging	L05715	Dallas	05	11/26/08
Dallas	E+ PET Imaging V L.P.	L05726	Dallas	10	12/09/08
El Paso	Desert Imaging	L05626	El Paso	09	12/01/08
El Paso	EP Medical Imaging Technology L.P. dba El Paso Medical Imaging Technology	L06095	El Paso	02	12/05/08
El Paso	El Paso Cardiology Associates P.A.	L05162	El Paso	08	12/02/08
El Paso	E. El Paso Physicians Medical Centers L.L.C.	L05676	El Paso	12	12/02/08
Fort Worth	John Peter Smith Hospital	L02208	Fort Worth	70	11/25/08
Fort Worth	Consultants in Cardiology	L04445	Fort Worth	18	12/05/08
Fort Worth	NDE Inc	L02355	Fort Worth	26	12/04/08
Freeport	Rhodia Inc	L02807	Freeport	36	12/03/08
Garland	E+ PET Imaging XII L.P.	L05875	Garland	05	12/09/08
Harlingen	Valley Baptist Medical Center	L01909	Harlingen	72	12/01/08
Houston	The Methodist Hospital	L00457	Houston	164	11/25/08
Houston	Memorial Cardiology Associates P.A.	L05349	Houston	11	11/26/08
Houston	Antoine G. Younis, M.D. P.A.	L05313	Houston	10	11/25/08
Houston	American Diagnostic Tech L.L.C.	L05514	Houston	52	11/25/08
Houston	Memorial Hermann Hospital System dba River Oaks Imaging and Diagnostic	L06181	Houston	01	12/05/08
Houston	Memorial Hermann Hospital dba Memorial Hermann Hospital	L00650	Houston	87	12/02/08
Houston	Petnet Houston L.L.C. dba Petnet Houston L.L.C.	L05542	Houston	21	12/01/08
Houston	Mallinckrodt Medical Inc	L03008	Houston	78	11/26/08
Houston	Ground Technology Inc.	L05125	Houston	11	12/01/08
Irving	Baylor Medical Center at Irving dba Irving Healthcare System	L02444	Irving	74	11/24/08

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Irving	Baylor Medical Center at Irving dba Irving Healthcare System	L02444	Irving	75	12/08/08
McAllen	Valley Nuclear Incorporated	L04521	McAllen	26	12/01/08
Mt. Vernon	East Texas Medical Center	L05954	Mt. Vernon	06	12/01/08
Muenster	Muenster Hospital District dba Muenster Memorial Hospital	L04887	Muenster	13	12/03/08
Nacogdoches	Nacogdoches Medical Center	L02853	Nacogdoches	40	12/04/08
Nacogdoches	Nacogdoches Heart Clinic	L04382	Nacogdoches	15	11/26/08
Paris	Advanced Heart Care PA	L05290	Paris	26	12/04/08
Pasadena	David S. Hamer M.D. P.A. dba Southeast Houston Cardiology	L05364	Pasadena	08	12/05/08
Plano	Comprehensive Breast Care Center of Tx Inc. dba Solis Womens Health	L05601	Plano	10	12/08/08
Plano	Baylor Regional Medical Center of Plano	L05844	Plano	06	12/03/08
Port Arthur	Smith & Thome Cardiovascular Consultants L.L.P.	L05743	Port Arthur	06	11/21/08
Rio Grande City	Advanced Nuclear Imaging Inc.	L05467	Rio Grande City	10	12/02/08
San Angelo	Shannon Clinic	L04216	San Angelo	44	12/08/08
San Antonio	Methodist Healthcare System of San Antonio dba Methodist Hospital	L00594	San Antonio	251	11/25/08
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	168	12/05/08
San Antonio	South Texas Radiology Imaging Centers	L03518	San Antonio	64	12/05/08
San Antonio	Heart Hospital of San Antonio L.P. dba Texsan Heart Hospital	L05722	San Antonio	11	12/05/08
San Marcos	Texas State University	L03321	San Marcos	28	12/09/08
Stephenville	Stephenville Medical and Surgical Clinic	L05309	Stephenville	14	12/03/08
Sugarland	St Lukes Sugarland Partnership L.L.P. dba St. Lukes Sugarland Hospital	L06180	Sugarland	02	11/24/08
Texas City	Blazer Inspection Inc.	L04619	Texas City	57	11/25/08
Throughout Tx	Desert Industrial X-Ray L.P.	L04590	Abilene	91	12/01/08
Throughout Tx	Eagle NDT L.L.C.	L06176	Abilene	04	11/26/08
Throughout Tx	RSI Inspection L.L.C.	L05624	Abilene	18	11/21/08
Throughout Tx	Houston Inc	L04362	Andrews	11	12/03/08
Throughout Tx	Applied Standards Inspection Inc.	L03072	Beaumont	105	12/02/08
Throughout Tx	Gulf Coast Weld Spec.	L05426	Beaumont	74	12/01/08
Throughout Tx	Nondestructive & Visual Inspection L.L.C.	L06162	Carthage	01	12/05/08
Throughout Tx	Texas A&M University Environmental Health and Safety Department	L05683	College Station	09	11/24/08
Throughout Tx	Escot NDE Inc. dba Basin Industrial X-Ray	L05002	Corpus Christi	30	11/26/08
Throughout Tx	Professional Service Industries Inc.	L04939	Corpus Christi	13	11/21/08
Throughout Tx	Fugro South Inc.	L03461	Dallas	26	12/04/08
Throughout Tx	H & H X-Ray Services Inc.	L02516	Flint	75	11/21/08
Throughout Tx	Fugro Consultants Inc.	L05843	Fort Worth	05	12/03/08
Throughout Tx	Roxar Inc.	L05547	Houston	14	12/08/08
Throughout Tx	Delta Tubular International L.P.	L03083	Houston	26	12/03/08
Throughout Tx	Professional Service Industries Inc.	L04942	Houston	21	12/02/08
Throughout Tx	Headwaters Resources Inc.	L05281	Jewett	05	10/02/08
Throughout Tx	Marco Inspection Services L.L.C.	L06072	Kilgore	18	12/02/08
Throughout Tx	Acuren Inspection Inc.	L01774	La Porte	249	12/03/08
Throughout Tx	Master Industries Inc.	L05872	Liberty	20	12/05/08
Throughout Tx	L and G Engineering Laboratory L.L.C.	L05647	Mercedes	09	12/01/08
Throughout Tx	Glenn Fuqua Inc.	L04736	Navasota	06	11/24/08
Throughout Tx	Conam Inspection & Engineering Inc.	L05010	Pasadena	159	12/02/08
Throughout Tx	Techcorr USA L.L.C.	L05972	Pasadena	55	11/21/08
Throughout Tx	Alcoa World Alumina Atlantic	L05186	Point Comfort	08	12/08/08

AMENDMENTS TO EXISTING LICENSES (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Schlumberger Technology Corporation	L01833	Sugarland	149	11/26/08
Throughout Tx	Blazer Inspection Inc.	L04619	Texas City	58	12/08/08
Tomball	Northwest Houston Heart Center	L05958	Tomball	02	11/26/08
Tyler	Trinity Mother Frances Health System	L01670	Tyler	141	12/09/08
Tyler	Trinity Mother Frances Health System	L01670	Tyler	140	12/03/08
Tyler	Physician Reliance Network Inc. dba Tyler Cancer Center	L04788	Tyler	13	12/01/08
Tyler	Trinity Mother Frances Health System	L01670	Tyler	142	12/09/08
Weatherford	Weatherford Texas Hospital Company L.L.C. dba Weatherford Regional Medical Center	L02973	Weatherford	20	11/24/08
Wichita Falls	Kell West Regional Hospital L.L.C.	L05943	Wichita Falls	06	12/08/08
Wichita Falls	Andre P. Desire M.D. P.A.	L06043	Wichita Falls	02	11/26/08

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alice	Usman Qureshi M.D., P.A. dba Alice Heart Center	L05366	Alice	03	12/02/08
Lubbock	M. Fawwaz Shoukfeh M.D., P.A. dba Texas Cardiac Center	L05276	Lubbock	13	12/01/08
Sugarland	Thermo Measuretech	L03524	Sugarland	77	12/04/08
Throughout Tx	Gulf Coast Weld Spec.	L05426	Beaumont	75	12/04/08

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Lubbock	Covenant Health System dba Covenant Imaging Center	L04005	Lubbock	19	11/26/08

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - MC 2835, PO Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-200806657
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: December 22, 2008

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Texas Department of Housing and Community Affairs

Notice of Public Hearing for the PY 2009 Weatherization Assistance Program Plan/Application

The Texas Department of Housing and Community Affairs (TDHCA) will hold a public hearing to receive comments on the draft program year 2009 Texas Weatherization Assistance Program State Plan. Texas anticipates receiving an allocation of $6,933,419 from the supple-

mental funding allocation and an estimated $5,549,413 regular annual allocation based on estimated 2008 level funding for program year 2009, totaling $12,482,832. Funding to subrecipients may be adjusted slightly based on the approved plan, the final 2009 regular annual allocation, and the allocation of carryover funds.

The public hearing will be held at 2:00 p.m. on Thursday, January 22, 2009 in Room #116, State Insurance Building Annex, 221 East 11th Street, Austin, Texas. (The State Insurance Building Annex is situated directly across the street from the Capitol Visitor's Center, on the southwest corner of East 11th and San Jacinto streets). At the hearing, a representative from TDHCA will describe changes to the Weatherization Assistance Program (WAP) and the proposed use of the U.S. Department of Energy funds for program year 2009, which will be for the period of April 1, 2009 to March 31, 2010.

Local officials and citizens are encouraged to participate in the hearing process. Written and oral comments received will be used to finalize the program year 2009 Texas Weatherization Assistance Program State Plan and Application. Written comments from those who cannot attend the hearing in person may be provided by the close of business at 5:00 p.m. on January 23, 2009, to Ms. Lolly Caballero, Senior Planner, Energy Assistance Section, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711 or by electronic mail to Lolly.Caballero@tdhca.state.tx.us or by fax to (512) 475-3935. A copy of the proposed Draft Plan may be obtained, after January 13, 2009, through TDHCA's web site, http://www.tdhca.state.tx.us/ea/index.htm or by calling Ms. Caballero at (512) 475-0471 or by writing to Ms. Caballero at the TDHCA address given above.

Individuals who require auxiliary aids or services for this meeting should contact Ms. Gina Esteves, ADA responsible employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for this meeting should contact Lolly Caballero, (512) 475-0471 at least three (3) days before the meeting so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-200806690
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 23, 2008

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 17, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Northland Cable Television, Inc. for an Amendment to its StateIssued Certificate of Franchise Authority, Project Number 36492 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City of Teague, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36492.

TRD-200806658
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 22, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 17, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36495 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the removal of the municipalities of Bandera, and Stockdale, Texas, and the unincorporated portions of Bandera County, Texas, excluding federal property.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36495.

TRD-200806659
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 22, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 17, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36496 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the removal of the municipalities of Encinal, Freer, Jourdanton, and Poteet, Texas, and the unincorporated portions of Jim Hogg County, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll

free at 1-800-735-2989. All inquiries should reference Project Number 36496.

TRD-200806660
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 22, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 17, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36497 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the removal of the municipality of Elkhart, Texas, and the unincorporated portions of Anderson County, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36497.

TRD-200806661
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 22, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 17, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36498 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the removal of the municipalities of Cooper and Graham, Texas, and the unincorporated portions of Young County, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36498.

TRD-200806662
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 22, 2008

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Notice of Appeal of Decision of ERCOT Legal Addressing ERCOT Protocols

Notice is given to the public of an appeal filed collectively by a group of Competitive Wind Generators of a legal interpretation by Electric Reliability Council of Texas, Inc. (ERCOT) Legal addressing ERCOT Protocols relating to reactive power. The appeal relates to the November 13, 2008, interpretation of reactive power Protocols §6.5.7.1(2) and §6.7.6(5) by ERCOT Legal.

Docket Style and Number: Appeal of Competitive Wind Generators Regarding the Electric Reliability Council of Texas' (ERCOT) Interpretation of the Reactive Power Protocols, Docket Number 36482.

The Application: Competitive Wind Generators seek appeal of ERCOT Legal's interpretation which addressed whether a Generation Resource is required to provide reactive power at its Unit Reactive Limit (URL), regardless of how much real power the Generation Resource is generating. Pursuant to PURA §39.151(d) and P.U.C. Substantive Rule §25.503(f)(2)(A), Competitive Wind Generators are appealing to the Commission, ERCOT's official interpretation of certain Protocols relating to reactive power.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 36482.

TRD-200806651
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 19, 2008

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 18, 2008, Lightyear Network Solutions, LLC filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60353. Applicant intends to reflect a change in corporate restructuring.

The Application: Application of Lightyear Network Solutions, LLC for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 36502.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 14, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36502.

TRD-200806711

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 29, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on December 18, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of six thousand blocks of numbers in the 281 NPA in the Spring rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 36503.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 14, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36503.

TRD-200806712
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 29, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on December 18, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of one thousand block of numbers in the 281 NPA in the Langhamcrk rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 36504.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 14, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36504.

TRD-200806713
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 29, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on December 18, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of one thousand block of numbers in the 972 NPA in the McKinney rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 36505.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 14, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36505.

TRD-200806714
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 29, 2008

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South East Texas Regional Planning Commission

Invitation for Bid

GENERAL: The 9-1-1 Emergency Network, a Division of the South East Texas Regional Planning Commission (SETRPC), is interested in purchasing eight (8) Sola Hevi-Duty uninterruptible power source (UPS) units.

INVITATION FOR BID: The competitive Invitation For Bid (IFB) will be available at the 9-1-1 Emergency Network office located at 2210 Eastex Freeway, Beaumont, Texas 77703 or the SETRPC website (www.setrpc.org) after 10 a.m. on January 12, 2009. Except for holidays, the 9-1-1 Emergency Network office is open 8 to 12 a.m. and 1 to 5 p.m. Monday through Friday. Copies of the IFB are available in Microsoft Office 'Word' format at the above website. Once the website is displayed, navigate your cursor to the left 'Main Menu' column, click on 'RFP/IFB', under 'Request for Proposal' click on '9-1-1 UPS IFB' and download the 'Word' document.

BID OPENING: The bid opening will be private. The 9-1-1 Emergency Network reserves the right to reject any or all bids and does not

bind itself to accept the lowest bid for the UPS units or any part thereof, and shall have the right to ask for new bids for the whole or parts.

TRD-200806675
Pete De La Cruz
Director of 911 Emergency Network
South East Texas Regional Planning Commission
Filed: December 23, 2008

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The Texas A&M University System

Asbestos Consultant

Request for Proposals (RFP): RFP01 FPC-09-005

The Texas A&M University System is seeking proposals from interested Proposers to provide asbestos consulting services in conjunction with the renovation of the Memorial Student Center on the campus of Texas A&M University located in College Station, Texas

The RFP documentation may be obtained by contacting: Don Barwick, HUB and Procurement Manager, System Office of HUB and Procurement Programs, The Texas A&M University System, 200 Technology Way, Ste 1273, College Station, Texas 77845 or e-mail at dbarwick@tamu.edu.

The A&M System finds it of utmost importance to plan and monitor the removal of any Asbestos Containing Building Materials found in the Texas A&M University's Memorial Student Center.

The A&M System will base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and if other considerations are equal give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

Proposals must be received on or before 2:00 p.m. CDT on January 19, 2009.

TRD-200806655
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: December 19, 2008

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Research Consultant

Request for Proposals (RFP): RFP01 VCR-9-007

The Texas A&M University System is accepting proposals and intends to enter into an Agreement with a consultant to Perform the duties of assisting with coordination of the development of the Good Manufacturing Practices (GMP) facility and related programs and potential industry partners with the Texas A&M University System.

The RFP documentation may be obtained by contacting: Don Barwick, HUB and Procurement Manager, System Office of HUB and Procurement Programs, The Texas A&M University System, 200 Technology Way, Ste 1273, College Station, Texas 77845 or e-mail at dbarwick@tamu.edu.

The A&M System finds it of utmost importance to provide direction for the development and implementation of a national communications campaign to proactively promote critical research and academic projects to key stake holders in federal agencies as well as potential partners in industry and academia.

The A&M System will base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and if other considerations are equal give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

Proposals must be received on or before 2:00 p.m. CDT on January 19, 2009.

TRD-200806648
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: December 19, 2008

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited
as follows: 33 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).